No. 12437

United States

Court of Appeals

For the Ninth Circuit

JAMES ANTHONY ALLEN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLANT

Upon Appeal from the United States District Court,
Eastern District of Washington,
Northern Division.

R. MAX ETTER,

WILLIAM E. CULLEN,
726 Paulsen Building,
Spokane, Washington.

THERRETT TOWLES,
1231 Old National Bank Building,
Spokane, Washington.

J. F. EMIGH,
55 West Broadway,
Butte, Montana.

JAMES A. MURRAY,
1624 Eye Street, N. W.,
Washington, D. C.,
Attorneys for Appellant.

SHAW & BORDEN CO. 300544

INDEX

Page

CITATIONS

CASES: Page

Page

United States
Court of Appeals
For the Ninth Circuit

JAMES ANTHONY ALLEN, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

No. 12437

BRIEF OF APPELLANT

JURISDICTION

This is a criminal action by the United States as plaintiff against James Anthony Allen, Francis Clayton Keane, and Joseph Valentine Grismer as defendants based on an indictment of the grand jury returned May 6, 1948, charging in seven counts use of the mails to defraud, fraud in the sale of securities, and conspiracy. Counts I, II and III of the indictment charge violations of the Criminal Code, Section 215, Title 18 U. S. C. A. Section 338, using the mails to promote fraud; Counts IV, V, and VI charge violations of Title 15 U. S. C. A., Section 77q, fraudulent sale of securities by mail; and Count VII charges violation of the Criminal Code, Section 37, Title 18 U. S. C. A. Section 88, conspiring to commit offenses against United States in violating said Title 18 U. S. C. A.

Section 338, said Title 15 U. S. C. A. Section 77q, and Title 15 U. S. C. A. Section 77e, using mails when no registration statement in effect (2). The statutes covered by the indictment are set out verbatim in the Appendix.

The jurisdiction of the District Court existed under Judicial Code, Section 24, amended, Subdivision (2), Title 28 U. S. C. A. Section 41, Subdivision (2), in force at time of filing of indictment.

Allen pleaded not guilty to all counts of indictment (67), was tried before a jury, and found not guilty on all of the substantive counts of the indictment, being Counts I to VI, inclusive, and guilty on the conspiracy count, Count VII (88).

Allen appeals to this Court from the judgment of conviction on Count VII of the indictment, entered July 16, 1949, which committed Allen to imprisonment in the penitentiary for a period of eighteen months (93). Upon entry of said judgment his bail was increased from $2,000 to $15,000; bail bond in the sum of $15,000 was filed and approved July 22, 1949 (15, 94), and he was released on bail pending the determination of this appeal. Notice of appeal was filed by Allen in the office of the Clerk of the District Court on July 25, 1949 (97). This Court has jurisdiction to review the judgment under Title 28 U. S. C. A. Section 1291.

STATEMENT OF THE CASE

Count VII of Indictment

Count VII alleged in effect a continuing conspiracy existing between defendants from prior to June 1, 1945, to date of indictment to violate mail fraud statute and federal Securities Act by using mails for purpose of defrauding purchasers and prospective purchasers of stock of Lucky Friday Extension Mining Company and Pilot Silver-Lead Mines, Inc., hereinafter referred to as Extension and Pilot, respectively, and to obtain money and property by means of false representations, in that defendants:

1. Promoted and organized Extension and Pilot and issued large portion of stock of said corporations to themselves, but concealed fact that defendant Allen was a promoter of these corporations or was to receive any part of the stock to be taken by defendants;

2. In order to conceal the true amount of stock issued to them caused large blocks of such stock to be issued to Elmer E. Johnston and James E. Gyde under pretense that such stock was in payment of attorneys' fees, but with secret arrangement that a portion of such stock or the proceeds from its sale would be turned back to defendants;

3. Caused these corporations to sell stock to investors upon representation that proceeds would be used for exploration and development of mining properties of Extension and Pilot;

4. Appropriated and diverted from these corpora-

tions a large amount of such corporate moneys to their own use and benefit;

5. Defrauded purchasers of stock of Extension and Pilot by false and fraudulent representations as to the

(a) Use of the net proceeds to be received from sale of stock by these corporations,

(b) names of promoters and persons in control of these corporations,

(c) fact that promoters would hold their stock for investment,

(d) amounts of stock issued to promoters and for legal services.

Only the allegations of Count VII covering what the court later instructed the jury to be the essential elements of the alleged scheme to defraud have been referred to.

The alleged scheme to defraud set forth in Paragraph I of Count I is by reference made a part of all other counts, and as to Count VII, court instructed jury that a scheme to defraud when scheme is conducted by two or more persons is in substance and effect also a conspiracy (1208-1209, 1270).

Allen was acquitted six times on this same and identical scheme to defraud or conspiracy supported by the same evidence on which he was convicted on the conspiracy count and the jury found in effect that on that same evidence the government had not proven to its satisfaction beyond a reasonable doubt that Allen

participated in or was a party to said scheme to defraud or conspiracy (88).

THE EVIDENCE

(a) Keane was in control of financial affairs of Extension, Pilot, Independence, Delaware, Montana Leasing, and Lexington Silver-Lead.

Keane organized Extension in June, 1945, and Pilot in January, 1946. Grismer became president of Extension and Keane its attorney. Keane became president of Pilot and his stenographer its vice president. The properties of these companies were acquired from Grismer. Public offerings of stock of Extension netted $178,000 and of Pilot $100,000. Of these moneys Extension expended on mine development $65,000 and Pilot $10,000. Grismer was mine manager for both companies. All records of these companies were kept in Keane's office which issued all stock. Keane handled all funds and issued all checks. (Pltf's Exs. 68, 69, 81, Deft's Exs. C, T, U; 179-186, 219-226, 384, 387, 395, 615, 631-632, 641.)

Keane as president of Independence Lead Mines Company, hereinafter referred to as Independence, had absolute control of its assets, including stock in Clayton Silver Mines. Independence advanced to Montana Leasing Company, hereinafter referred to as Montana Leasing, during 1943 to 1945, inclusive, about $125,000. Keane sold through his personal account in private transactions 218,000 shares of Clayton stock for about $112,000 and accountant on Keane's statements charged this to Montana Leasing (241, 224, 673-674, Deft's Ex. L).

Keane caused Montana Leasing, with properties in Montana, to be organized and became its president. Its successor, Lexington Silver-Lead Mines, Inc., was organized by Keane in 1945. Independence and Delaware Mines Corporation agreed to and did invest capital in development of the Montana properties, for which these companies received production notes and substantial stock interests. Allen had charge of its mining operations only. (Deft's Ex. G, H, 681-684, 1029, 1056, 1108-1113.)

(b) Keane's conversions.

There was not even a reasonable doubt as to Keane's guilt in diverting the moneys of Extension and Pilot. The court said that Keane by virtue of his office, his name, and his signature was guilty to an absolute certainty whether he pleaded *nolo contendere* or not, and that he admits conversion (Black, 663, 1290.)

The important testimony in this case concerns the conversion of the money (Black, 906). The court termed Keane "the evil Mr. Keane"; that Keane was "confessedly evil," and referred to "those evil acts of Mr. Keane." (929, 930, 931.)

There is also testimony that Keane forged Allen's name to a promissory note from Montana Leasing Company to Independence Lead Mines Company for $60,000 dated October 14, 1944 (Deft's Ex. M, Pltf's Ex. 95) which Allen first saw in March, 1947, with no names on it (Allen, 1075-1076), and that Keane forged Allen's name to a check dated December 3, 1945, of J. A. Hogle and Company, Butte, payable to Allen for

$6,872.95 (Pltf's Ex. 105; 824) representing the sale of Extension stock through his name, which Allen never delivered to said firm and which check he never received nor saw until it was introduced at the trial (Allen, 1076-1078, 1092). Allen never at any time authorized Keane or Mrs. Vermillion to sign his name on notes or checks (1090-1091).

This is the same Keane referred to in the dissenting opinions in the case of *Independence Lead Mines Co. v. Kingsbury* (1949), 9th Cir. 175 F. 2d 983, as a criminal.

Randall's audit of Extension, Exhibits A, C, Schedule 1b thereto, shows that between July 28, 1945, and May 17, 1946, $113,000 was checked out of Extension funds by Keane as attorney for the company and run through the bank account of Montana Leasing and its successor, Lexington Silver-Lead, on which the latter through Keane returned $28,310.35, leaving balance due of $84,689.65 (Deft's Ex. T).

Randall's audit of Pilot, Exhibits A, C, Schedule 1 thereto, shows that between May 22 and August 23, 1946, $81,300 was checked out of Pilot funds by Keane as president and run through Lexington Silver-Lead bank account, on which he returned $20,635.67, leaving balance due of $60,664.33. That he advanced $1,200 to War Eagle Silver-Lead Co., $3,000 to Extension, and $10,000 to Independence (Deft's Ex. U).

Keane testified there was no corporate action taken by these companies authorizing the diversion of these moneys (658).

(c) Keane's Excuse for Conversions.

It is appropriate at this point to consider Keane's excuse in mitigation of his criminal conduct—habitual intoxication at the time the offenses were committed—advanced for the purpose of having the Court accept his plea of *nolo contendere* and later to secure a light sentence by the Court both by reason of his intoxication, his possible disbarment as an Idaho attorney, and his assistance to the government in the prosecution of Allen.

Keane admitted on cross-examination that the statements made to the Court (Judge Driver) by his counsel in his presence on December 8, 1948, when he offered to plead *nolo contendere* might have been embellished somewhat (Keane 754-755, 29-30).

Keane's counsel at that time also told the Court that it was not entirely a habit of whiskey that had brought about his condition, but the doctors found that it was a result, in part, of malnutrition, and since he went to the hospital and took treatments, there had been a great change in Keane, a complete rehabilitation and since that time he is able to carry on and engage in the practice of law (30).

The Court, in accepting the plea of *nolo contendere* stated that "during the time of the commission of the offense charged he was drinking heavily and continuously" and as a professional man of his age "the man is entitled to a chance to avoid disbarment if he can" (46).

Keane testified on direct examination that Allen took full charge of the negotiations and negotiated on behalf of Extension the contract between Extension and Lucky Friday Silver-Lead Mines Company, known as "Big Friday" (mentioned in the Extension prospectus) because "at the time, if I recall correctly, I was under the influence of intoxicating liquor" (658).

When defendant's counsel was testing Keane's memory on cross examination on the Independence audit, the following occurred:

"Q. Is there any reason, Mr. Keane, that you have no recollection of any of these things?

A. Yes.

Q. What is it?

A. Intoxication.

Q. During what period of time?

A. Oh, from shortly after Mr. Allen and I were very active together I drank very heavily, up until the fall of '47.

Q. Until the fall of '47?

A. That is correct; very heavily. I was practically a common drunkard.

Q. I see; you don't recall any of these things, then?

A. I recall some of them, yes. I had moments of sanity at intervals, but I was drinking very heavily." (697.)

Keane says he was drinking when he participated in the organization of Montana Leasing Company (700) and he testified on cross-examination as to Deft's Ex. J, Independence minutes of June 29, 1943, as follows:

"Q. And pursuant to that investigation didn't you have these minutes drawn and dictated in 1947?

A. I question whether or not I was competent at any time during the year 1947 to draw any minutes or do anything else.

Q. * * * well, Mr. Keane, was there any time that you can recall between the fall of 1946 and say, June of 1947, when you were competent?

A. Well, it would be at very slight intervals.

* * * * * *

Q. There were very few intervals?

A. That's right.

Q. You, however, in June of 1947, did you become fairly competent in June of 1947?

A. Not too competent.

* * * * * *

Q. Well, let's go a little farther; in July of 1947?

A. Probably a little worse.

Q. A little worse or a little better?

A. A little worse than I had theretofore.

Q. And was this a matter of drinking at that time?

A. Absolutely.

Q. It was?

A. Yes." (737.)

He supplied very little information for the complaint he filed in a civil action against Allen, Grismer and others at Wallace, Idaho, in June, 1947, because he was incompetent at that time (738), and his physical

condition was not good at the time he paid Horning in June, 1946, a $10,000 fee for legal services in some Independence litigation, which he took from Pilot funds, but it was not as bad then as it got later (751), and he testified:

> "Q. * * * Is there any way, Mr. Keane, that you have of telling us, any standard that you know of, by which you know now that at certain particular times you were all right to do business, and at other times you weren't? Can you tell us now how you happened to know, or knew?
>
> A. Well, if I didn't remember what had occurred, the next morning, I figured I was not in shape." (753.)

and again:

> "Q. Now, getting back to another question with respect to your statements about your recollection in 1947, what was the condition of your health during the early part of 1947?
>
> A. Well, my nerves were in terrible condition, and I was undernourished, I wasn't eating regularly, I was depending upon whiskey as nourishment, and late in the fall I discovered that it had affected my heart, sclerosis of the liver, and high blood pressure, all of which I am still suffering from." (759.)

Allen testified on cross-examination that in spite of Keane's drinking he did not have any real suspicion at the time to question the manner in which Keane was handling the bank accounts, as follows:

> "Q. Well, you knew he was drinking at this time, didn't you?
>
> A. Oh, not any more than he is right now, or any more than Mr. Horning is drinking, or Mr.

> Jones. If Mr. Keane was an incompetent during that time it was deceptive to Mr. Hull, the attorney for the Marquard-Kingsbury lawsuit that settled with him in June, 1946, Mr. Horning, Mr. Jones, and all of them, as well as it was to me." (1114.)

(The Jones referred to is O. L. Jones, manager of bank at Wallace, 1060.)

And Keane's wife testified that when Allen called at their home in the fall of 1946, Keane was "stone sober" and had not had a drink for over two months (1176-1179).

Nevertheless, on the pleas of Keane's counsel to the Court just before sentencing of Keane (101), the Court said that Keane had entered a plea of *nolo contendere* some time in advance of trial and that he took the stand and testified for the government.

Judge Driver fined Keane $1,500, suspended the imposition of any confinement under the sentence, and placed him on probation for a period of four years. The court also ordered Keane to refrain from drinking intoxicating liquor during the first two years of the probationary period, and during the probationary period to demean himself as a law-abiding, orderly, industrious citizen (117, 120-121).

(d) Keane's testimony indispensable to convict Allen on conspiracy charge.

The megalomaniacal delusions of Keane did not permit him merely to furnish evidence to and assist the government in the preparation of this case (Denney, 834, 908-909, 920, 924). He became the star witness for the government at Allen's trial by his startling and

sensational testimony of his admitted thievery and gambling with trust funds and drunkenness to such an extent that he became a common drunkard (Keane, 663-664, 697, 1181). In June, 1947, and prior to the return of the indictment, this defendant lawyer had commenced an action against Allen, Grismer, and others in the State Court at Wallace, Idaho (Keane, 738), about which Keane made a public announcement in the newspaper that he had "borrowed" all the money in question (Allen, 1148) which he in this trial admitted that he had embezzled.

Keane testified that in the early spring of 1945 a large sum of money had been spent on Montana Leasing Company's properties and the company was in financial difficulties (610).

In order for the government to prove the gist of the crime of conspiracy, to-wit, an agreement among conspirators to commit an act in violation of the federal statutes and a corrupt intent and wrongful purpose, Keane was the key witness for the government and he testified that Allen proposed that they incorporate the Extension ground, make some money out of the promotion of the Extension, if they could, and bail themselves out (611-612).

The government contended through the testimony of Keane that a partnership existed between Keane and Allen; that on October 5, 1943, they commenced operating as a partnership under the firm name of Montana Leasing Company, and that they were equally interested in Keane's share of the stocks he received from

the attorneys and vendors of Extension and Pilot and his promotion stock in Pilot (Keane, 610, 614, 622-623, 630, 659-660, 701-703, 707), and through Keane's testimony a 1943 federal income tax return of Keane and Allen as a partnership, prepared by Randall, was admitted in evidence (Pltf's Ex. 93) solely for the purpose of showing Keane was contending in 1944 there was a partnership between the two of them, although Allen did not sign it, nor did Keane mail a copy to him (Keane, 739, 762-766).

Allen denied that any such partnership ever existed. In March, 1947, Allen approved the terms of Deft's Ex. M, $60,000 production note dated October 14, 1944, of Montana Leasing to Independence and would have executed it if it was the instrument of the corporation, and stated that Montana Leasing Company was never a partnership (1075-1076, 1152).

Also, thirty-one of the exhibits offered by the government were identified by and introduced through the testimony of Keane (631, 634, 636, 640, 641, 642, 650, 651, 652, 655, 766, 768, 769, 781, 788).

(e) Record evidence disproved Keane's testimony as to financial condition of Montana Leasing in spring of 1945.

Allen vehemently denied making any such proposal to Keane as Keane testified to. Allen testified:

> "Q. Now, you heard the testimony here by Mr. Keane that in the middle of 1945 you and Mr. Keane had to figure something out to bail yourselves out?
>
> A. I did, and that's—

Q. What have you to say to that statement, Mr. Allen?

A. Well, it is not only the worst falsehood that was ever spoken, but it's a ridiculous statement." (1066.)

Allen stated that he first became interested in Extension after the stock had been sold; that by October, 1945, the market on all stocks had become very good and the original issue of Extension stock was sold overnight (1037, 1141); there was a good, strong, firm demand for mining stocks, and that was true of Pilot and Extension stocks (Johnston, 604).

Allen explained there was no necessity from the records for bailing out as Keane had stated:

"Q. Why do you say that?

A. Well, after seeing the Independence audit, and having the Delaware records, the royalties paid during the year for the Delaware Mines Corporation, which was investing all of its money, in addition to my personal investment, if Mr. Keane's audit of Independence was correct, which was committed to the financing the same as the Delaware, the operations at the mine for the month of January of 1945 was $6,140.08; February, $6,642.53; March, $6,341.04; April, $5,077.41; May, $5,976.94; June, $4,971.67; July, $6,007.74, and August, $4,266.87. If $3,000 a month additional expense was added to that, there would still be a balance in August of twenty some thousand dollars.

Q. A balance of twenty some thousand?

A. A balance ready for finance between the Independence and the Delaware and combined with what I personally put in, not knowing what Mr. Keane might have put in.

Q. There would have been $20,000 in the bank?

A. Yes, assuming there was an additional $3,000 a month, that I don't say there is." (1066-1067, 1078.)

Approximately $70,000 was checked out of Delaware, and should have gone into Montana Leasing, or its successor, Lexington Silver-Lead. The smelter checks went to Keane and would be deposited from his office (Allen, 1091, 1120-1121). Keane's financial transactions were handled in such a way that an audit of Delaware might not show what that company received and invested in Montana Leasing. Keane deposited in some instances smelter settlement checks of Delaware directly in Montana Leasing account (5 items of Pltf's Ex. 9a; Keane, 639) and check for loan of $6,000 by Callahan to Delaware was deposited on Keane's instructions directly into Montana Leasing account (Keane, 645).

Montana Leasing had no other obligations, except perhaps outstanding payroll checks of about $1,000; the commitments to Independence and Delaware were not pressing obligations as they were payable out of production and the contracts for acquisition of property were not a liability as they were payable out of smelter returns (Allen, 1067).

In the middle of 1945 Allen did not know how much money Keane was putting into Montana Leasing from the Independence treasury, nor did Keane himself know the exact amount. Allen tried to have Keane have an audit of Delaware and Independence made each year, but Keane would procrastinate in doing so (Allen, 1068; 1127). Checks of Independence to Allen to

June, 1943, were loans to Lexington Mining Company secured by mortgage and for Lexington payrolls, repaid to Keane personally as he requested for Independence (Pltf's Ex. 125); total checks paid back to Keane for Independence at that time amounted to $29,408.88 (1123-1124).

During 1945 Allen wrote his personal checks totaling $4,500 for Montana Leasing and they were deposited through Keane's office to Montana Leasing (Deft's Ex. X; 1068) and another thousand the bank record will show but he has not been able to find the slip (1069). During 1946 he gave his personal checks to Montana Leasing or its successor, Lexington Silver-Lead, totaling $70,000 (Deft's Ex. Y), plus two checks, one dated August 17, 1946, for $3,000, and one dated November 19, 1946, for $2,000 shown on bank statement, but he cannot find the checks, a total of $75,000 (1070). During 1947 he gave personal checks to Lexington Silver-Lead on his personal funds amounting to $76,000 (Deft's Ex. Z, 1071) and in 1948 personal checks amounting to $27,500 (Deft's Ex. AA, 1071). These payments from Allen's personal funds totaled $184,000.

The answer to Denney's testimony that there were twenty deposits made out of Extension and Pilot funds when there were overdrafts in Montana Leasing bank account (875) was given by Keane himself when he testified that as to overdrafts appearing on bank statements of Montana Leasing or Lexington Silver-Lead, the account was not actually overdrawn; when checks

would come in, the bank would notify his office and arrangements would be made to cover them during the day, so that while the bank statements show an overdraft, it actually was not an overdraft; there were funds on hand to pay those checks (619).

When Allen took over Extension and Pilot with Mullen and Grismer, the companies were without funds and Keane had permitted the charter and articles to lapse (Allen, 1073). So Allen, in addition, personally advanced moneys to Lexington Silver-Lead account in order to save bookkeeping costs and advanced on behalf of Extension and Pilot in 1946 and 1947 to Grismer $15,147.85, to Mullen $5,815.03 (Deft's Ex. BB) and on November 20, 1946, advanced to Pilot $7,000 (Pltf's Ex. 18, Allen, 1071-1074).

Montana Leasing had a development cost in 1945 of about $70,000; and in 1946 about $56,000 (1078).

Summaries of monthly operations at the mine prepared from daily mine records of Montana Leasing for 1945 and 1946 were admitted in evidence, Deft's Exs. DD and EE (1099). These are not intended to be a statement of the financial affairs of the company for 1945 and 1946. Keane secured the bank statements from the bank at Wallace and was supposedly keeping ledgers for that purpose (Allen, 1099).

Allen, on cross-examination, testified:

> "Q. Were you acquainted with the financial condition of the Montana Leasing Company in 1945, or the Lexington Silver-Lead Mines, as to

whether or not they had money enough to operate at that time?

A. I believe you would find, as we see it now, that at no time in connection with the operations was it the practice of keeping a surplus of funds in the Montana Leasing or the Lexington Silver-Lead in itself, but to draw from the treasury of the Independence or the Delaware or personal, as it was needed.

* * * * * *

Q. Whose job was it to see that there was money enough in the bank to cover the payroll checks?

A. Mr. Keane assumed that authority, because of the heavy investment of the Independence.

Q. Isn't it a fact that in 1945 that the Montana Leasing Company or the Lexington Silver-Lead Mines was short of money and in very desperate need of a new source of funds, the Independence funds had been exhausted?

A. Not to my knowledge, Mr. Erickson. The Independence funds according to that audit were not exhaused, the Montana Leasing Company was not pressed for any money, and if it had been, it could have been shut down on ten minutes' notice, if that was the case.

* * * * * *

Q. Well, you wouldn't know the condition of the Montana Leasing Company in 1945 from an audit made in 1947, would you?

A. No, I would know it from Mr. Keane.

Q. What did Mr. Keane tell you about that?

A. Well, that at all times that in my (his) opinion the Independence had sufficient money to carry through.

Q. Didn't he state to you that the money had run out from Independence about 1945, and that some other source of money would have to be secured?

A. He never did; it was never mentioned." (1127-1129.)

(f) Source of Allen's personal investment in Montana Leasing.

Allen further testified on cross-examination to the source from which he obtained the money to personally invest in Montana Leasing. From proceeds from sales of Extension stock for the years 1945 to 1948, inclusive, he received $72,411.76.

Also, $9,000 from sales of Pilot stock in 1947, and sales of Merger, Hunter Creek, Rainbow, Callahan Consolidated, Silver Syndicate, mortgages on his house and car, and personal loans without security, so that he now owes $50,000 (1137-1140). After he and Grismer were left with the bare corporations, most all sales of stock were made through his accounts; Extension stock was sold at an average price of 8.966c or $73,-423.01, and 525,000 shares of Pilot at an average of about 3c per share, or $15,750.00, totaling about $89,000 (1166). Allen put more money into Montana Leasing than he received from the sale of stock or what he has drawn out chargeable against his personal account by about $80,000 (1167).

Allen had an agreement with Grismer for 300,000 shares of Extension, and Grismer would get stock in other companies that Allen owned in the Mullan area or that would be formed (1042, 1141). Allen's verbal agreements with Grismer on their stock deals were

made September 1, 1945, and April 29, 1946, and reduced to writing in 1948 (Grismer, 401-402; Pltf's Exs. 67, 67a, admitted 404). The stocks involved were in many different companies (Allen, 1103-1104). It was not a partnership agreement but a continuing agreement to trade and exchange certain stocks, after he and Grismer had to take the records and companies away from Keane in order to keep the companies together, it was just a question of using the stocks for the purpose of getting sufficient money to keep the companies together (1142-1143).

The court instructed the jury that Allen had the legal right to sell any stock in Pilot or Extension owned by him upon the following conditions:

(1) That such sale occurred after the expiration of one year after the date of the first offering of such corporation's stock for sale through an underwriter, or

(2) Upon broker's transactions executed upon customer's order on any exchange or in the open or counter market, but not on the solicitation of such orders; and further, that this right of Allen to legally sell any such stock would only extend to such stock as he was selling independent of any criminal scheme or conspiracy to violate the mail fraud law or the Securities Act (1219).

Allen testified that Pltf's Exs. 116 and 117, showing sales by Allen of Extension and Pilot stocks are substantially correct, but Pltf's Ex. 114 shows a sale of 25,000 shares of Extension in November and December,

1945, which stock Keane gave him for his right to purchase Allen's option on Delaware stock of 500,000 shares of Baumgartner stock, which option Keane exercised; this was free stock; and Allen used his wife's maiden name in this transaction, not to conceal his activity in Extension stock, but because he was very fond of his wife and family. As for the sale of 30,000 shares of Extension shown on this exhibit for $6,872.95 in Allen's name through J. A. Hogle & Co., Allen never delivered the stock to the brokers or received the check (1091-1093, 1164-1165). Sales by Allen of vendor's stock of Extension and Pilot were made more than a year after the two original issues of Extension and original issue of Pilot to the public (1093-1095), or on broker's transactions executed upon customer's order in the open or counter market, unsolicited by Allen, as shown by the evidence.

(g) Payment of $20,000 of Pilot funds to Coeur d'Alene Mines for Coeur d'Alene Consolidated.

The cashing of a check at Wallace, Idaho, of E. J. Gibson & Co., for $40,000 on May 22, 1946, was overt act No. 8 of Count VII of the indictment (12). Pilot audit, Ex. C, Schedule 1, (Deft's Ex. U) shows the following:

> "Note 1: The charge of $20,000 on May 22, 1946, does not actually represent a check written. The company received a check for $40,000 from E. J. Gibson & Co. on May 22, 1946, of which $20,000 was deposited to the account of Lexington Silver-Lead Mines, Inc., and $20,000 was deposited to the account of Pilot Silver-Lead Mines, Inc."

On May 22, 1946, Keane was both president of Pilot

and president of Coeur d'Alene Consolidated. Pursuant to the terms of escrow agreement between Coeur d'Alene Consolidated and Coeur d'Alene Mines dated May 23, 1946 (Pltf's Ex. 39) prepared by Keane and Horning when Keane was president of Coeur d'Alene Consolidated (Allen, 1160) and according to Keane's testimony as to the juggling of this $40,000 check (Pltf's Ex. 13) and not shown on Randall's audit, Keane took $20,000 of Pilot money and on May 23, 1946, purchased a $25,000 cashier's check for Coeur d'Alene Mines on behalf of Coeur d'Alene Consolidated (Pltf's Ex. 39; Keane, 629). The bank's transactions were with Keane (Kraemer, pro-manager Idaho First National Bank, Wallace, 315, 316).

Allen testified that the first time he saw the $40,000 check was in the district attorney's office and that he did not deliver it to Keane (1088-1089). Allen's understanding is that Keane received from the bank the cashier's check for $25,000 and gave it to Horning, who delivered it to Coeur d'Alene Mines at a meeting at 7:30 P. M. on May 23rd (Allen, 1161); that Keane was borrowing Gyde's money of $15,000; that Horning and others were to put up cash also, and Keane said he would take care of it all (Allen, 1161).

(h) Allen's interest in Extension and Pilot affairs.

The government contended that Allen was an active participant in the affairs of Extension and Pilot, but was concealing his interest. Keane testified that he and Allen discussed the organization and promotion of Extension and that it was understood that Allen

could not become a promoter of Extension because of an SEC consent injunction against Lexington Mining Company and Allen in the federal court at Seattle on June 4, 1943, which involved sales of Lexington-owned Callahan stock (Pltf's Ex. 121, Keane, 612-614). The filings for Extension and Pilot, including the prospectuses, were prepared by attorney Johnston under Regulation A, claiming exemption from full registration (Pltf's Exs. 81 and 89; Johnston, 575-576); there was a three-year limitation on the injunction under that regulation (Johnston, 541; Allen, 1132), and when Keane employed Johnston to qualify Extension with SEC in May, 1945, he advised Johnston that Allen was under a civil injunction and that Allen would have no active part in the handling of any projects until the limitation expired (Johnston, 540-541). Because of the representations made to him by Keane and Grismer that Keane was going to run and look after the Pilot, Johnston stated in the Pilot prospectus that the company was promoted by Keane and its activities to date were completely controlled and dominated by him, and the work that Allen was doing and the advice he was giving to Grismer did not change his opinion as to who was dominating the company. Neither Keane nor Grismer ever told Johnston that Allen was promoting these companies, and the statements in the prospectuses are his conclusions from all the facts he could gather (Johnston, 595-600). Allen did not consider that the injunction prevented him from entering any mining organization (1131). Grismer told the SEC

officials Allen was not a promoter of these companies (426).

In addition to Keane and Grismer, the following witnesses were called by the government to show that Allen was an active participant with Keane in the affairs of these companies:

Mrs. Irene Vermillion, Keane's stenographer and vice president of Pilot (149) and the girl who handled the financial part of the companies (Erickson, 140), who could not have helped but know of Keane's defalcations of Extension and Pilot funds from the start to the finish but did not tell on her boss;

Attorney Horning, who, on behalf of Big Friday, negotiated a lengthy contract with Allen, who was principal negotiator for Extension (258);

Attorney Gyde, who was employed by Keane to perform legal work for Pilot (277-278);

Mrs. Emaline A. Phelan and W. H. Herrick of Cincinnati Mining Company, with whom Grismer negotiated with Allen's help the acquisition by Pilot of the Phelan and Cincinnati claims (283, 295), the consideration for these deals being paid by Keane (294, 304);

Beatrice McLean French, secretary of Callahan Consolidated, who assisted Mrs. Vermillion with stock transfers when Evans became ill (326-357);

Glynn D. Evans, secretary-treasurer of both Extension and Pilot, who worked in Keane's office at the time and who was instructed by Keane to mail the let-

ters and certificates of Extension stock to the brokers, and who allowed Keane to usurp the duties of his office as treasurer of both companies, and who was permitted, over objection, to testify that Keane and Allen were dominating the Extension, but he really did not know what part Allen had in it, nor much about the organization (Evans, 360-362, 367-368, 374-375); and,

Attorney Johnston, who was attorney for Hunter Creek and Silver Dollar Mining Companies and experienced in SEC matters, and who was employed by Keane to prepare and make the filings of Extension and Pilot with the SEC (537, 578, 595).

While Horning may have been the "master" (Keane, 722), Grismer a "dupe" (Black, 1290) and a "cat's paw" (Driver, 61-62), and Keane was the admitted embezzler (Erickson, 147), Allen was a good arbitrator, administrator, and conciliator, a man who was trying to get everybody together, a man who in the fall of 1945 was proposing to put a deep shaft down farther north than the Hunter Creek property and carry on a big extensive, deep development program called the Big Hunter project named after the Gold Hunter Mine, in addition to the three-way project for deep development of Hunter Creek, Extension and Big Friday; there were repeated rows and fights and Allen thrashed them out (Johnston, 580-592).

Herrick testified that there is a long tunnel that goes through the Gold Hunter property; that Allen discussed with him this central development plan, using the Gold Hunter as the axis, and that he was negoti-

ating with the owners of Gold Hunter in Chicago, and if able to acquire that property, his plan of consolidation on this central development would include Big Friday, Extension, Pilot, Hunter Creek, Idaho Silver, Cincinnati, and other properties in that section of Idaho (301-303). Grismer testified to the same effect (449) and added "that was the nucleus of the whole thing" (451).

Allen testified as to the properties that could be developed by putting them all into a central development, because of the vein systems that traverse them and to avoid questions that might arise as to extralateral rights through separate development by various companies, and that such development be done through the Gold Hunter Mine which had two or three miles of underground workings with shaft from the tunnel to the 1,200-foot level, a 600-ton mill, a production record of about twenty million dollars and was located on the highway and railroad (1032-1033, 1050). He commenced active negotiations with the Gold Hunter in February, 1945, and discussed it with the owners of mining properties in that vicinity (1034-1035). The veins on Pilot dipped south and at depth would be found in other properties (1036). He went to Chicago in the summer of 1945 and met the attorney for the owners of the Gold Hunter who was also an officer of the company (1047) and made a continuing offer of $250,000 for the property based on its physical value and went back to Chicago for said purpose in 1946 and in December, 1947, but without success (1048-

1051). He has since been negotiating with Day Mines, one of the largest mining companies in the Coeur d'Alenes (1104-1105).

(i) Extension and Pilot stock issued for attorneys' fees.

The indictment charged there was a secret arrangement that a portion of the stock allowed for attorneys' fees for Extension and Pilot or the proceeds from its sale would be turned back to the defendants.

Extension prospectus provided for the issuance to attorneys Johnston and Keane for legal services in forming the company and acquiring its property of 500,000 shares of Extension stock and stated that none of the proceeds of the offering made by or for the attorneys would accrue to the benefit of the company (Pltf's Ex. 69).

Likewise, the Pilot prospectus provided that the company agreed to pay attorney Johnston $1,000 and to issue to him 50,000 shares of stock and to attorney Gyde 150,000 shares of stock for legal services in forming the company and in acquiring and grouping the mining claims; that said stock might be held as an investment or sold at the company's offering price, less commission, and that none of the proceeds, if sold, would accrue to the benefit of the company (Pltf's Ex. 68).

The facts are that Johnston talked with Keane as to his compensation for services to Extension and testified that Keane agreed that the fee would be 500,000 shares, of which Johnston would receive 75,000 shares

for attorney's fees and the use of his office in Spokane, and Keane would receive 425,000 shares. Keane mailed him the certificates in 25,000-share denominations and he endorsed and returned all of them back to Keane, except the three he retained (Johnston, 546-547).

Johnston testified that for his services to Pilot Keane paid him his cash fee of $1,000, and he received 50,000 shares of Pilot stock (545, 576). The $1,000 was paid by Montana Leasing check signed by Allen dated May 14, 1946, in response to Johnston's letter to Keane of May 4, 1946 (Pltf's Ex. 8-L-1, 82; Johnston, 556), delivered to him by Allen (556) at the request of Keane (Allen, 1117).

In April, 1946, Gyde agreed to terms laid down by Keane as to his compensation for legal services rendered to Pilot that he was to have 25,000 shares out of 150,000 shares to be issued to him, and the balance to be returned to Keane to pay off other persons who helped with the organization of Pilot (Gyde, 278, 279). Gyde actually did not receive a certificate for 25,000 shares, but the cash in lieu of it—Keane's checks of May 22 and 27, 1946, for $2,500 (Pltf's Ex. 30). Two checks of Gibson company payable to Gyde (Pltf's Exs. 31, 31a) totaling $14,500 were delivered to him by Keane, which he endorsed and returned to Keane (Gyde, 280-283).

(j) Keane's termination of relations with Allen and Grismer.

As Allen did not have available to him the bank records of Delaware and Montana Leasing or its succes-

sor, Lexington Silver-Lead, or Pilot or Extension, which were being kept by Keane, he did not have occasion to question Keane's integrity or his manner of handling the bank accounts (Allen, 1059, 1113); he trusted Keane implicitly because of the men Keane was dealing with (1121, 1168); and so did Grismer, who testified:

> "Well, people say, 'Why in heck did you trust him?' I will tell you why. He was attorney for the Independence; he was president of the Independence Lead; he was attorney for the Clayton. They trusted him; why in hell shouldn't I? That is my answer, and I say, unfortunately." (453.)

and attorney Johnston had confidence in Keane (595).

Allen, too, relied on the arrangements made by Keane to make Independence payments for Montana Leasing through Allen's name instead of directly to Montana Leasing, and he had no right to question his authority or intention for doing it that way (1124).

Allen had been trying to get from Keane audits on all companies interested in Montana Leasing since 1945, but Keane would always ask him to wait until he finished the Kingsbury-Marquard litigation with Independence. When that case was settled in June, 1946, and some $40,000 went out of Pilot, which Allen believes went into Keane's account and then out to attorneys Horning, Hull, McCann and Langroise, he did become suspicious of Keane (1121-1122, 1147-1148, 1168). Grismer complained to Allen in September and October, 1946, that Pilot bills were not being paid, and both Allen and Grismer became suspicious of Keane

and made several trips to his house (1079-1167). Allen made demands on Irene Vermillion in September, 1946, to see the Montana Leasing records, but Keane had told her that Allen had been through for a long time and that he could see nothing (Allen, 1063-1169).

Grismer testified that the work on the Pilot ceased in December, 1946, because the bills were not being paid as the company had run out of money. He had quite a few discussions with Keane, as he was handling the money, but he never could get from him any explanations; it was always a run-around. Grismer advised and talked with Allen, and Allen seemed to be at a loss as to why the bills were not paid (Grismer, 407). Keane would evade Grismer, and in Keane's office the only one he could contact was Mrs. Vermillion, and just prior to December 10, 1946, she told him the bank deposits were in terrible shape (452-453). Grismer then knew there was something radically wrong, and on December 12, 1946, he secured a meeting of the board of directors of Extension and said to them: "I can't get any statements, can't get nothing from Keane, as to the Lucky Friday or the Pilot," and Keane was thereupon discharged as attorney for Extension, his name ordered stricken at the bank, the office was ordered moved from Keane's office to Grismer's office, and they secured stock ledger, stockholder's list and seal from Evans, then secretary in Keane's office—the rest of the books were in the safe (454). Attorney Wayne (now deceased, 1086) was employed by Grismer (Grismer, 456) and after many appoint-

ments not kept, Keane finally agreed to resign from the Pilot but wanted sixty days to get bank balances in shape (Allen, 1084-1085). The resignations of Keane, Vermillion and Evans as officers and directors of Pilot were secured February 21, 1947 (Deft's Exs. Q, R, and S; Allen, 1083-1084), but they never secured bank ledger, checks, etc. (1085). Grismer had called on Allen and between Allen and Wayne the resignations were secured (Grismer, 456; Deft's Ex. C). At the meeting of February 21, 1947, neither Keane nor Irene Vermillion made any claim of a partnership agreement between Allen and Keane (Allen, 1086).

Allen went to Keane's home in October, 1946, and in Mrs. Keane's presence, demanded that Keane make a disclosure and complete the Lexington Silver-Lead organization and stated if he did not do so, he (Keane) would be disbarred and go to the penitentiary. He pleaded with Mrs. Keane that, if she had any influence with her husband, to use it and have him make this disclosure and quit evading everybody. Allen further told Keane that from all appearances, it looked as though Keane was short about $100,000 in some companies (1169-1170). Allen denied making any such statement as testified to by Keane and his wife demanding that Keane turn everything over to him because he had $200,000; that he knew of no purpose or reason for saying it, he wanted Keane to turn over things to complete these corporations, such as titles or contracts in his name, but not for the sake of giving him any money or that he (Allen) had $200,000 and

would take it (1082). Allen was not at the time intoxicated as testified to by Keane and his wife, but was in a pleading mood to get Keane to make a disclosure (1080-1081).

In June, 1947, Allen requested of O. L. Jones, manager of the bank, the right to examine the bank account of Montana Leasing, but was refused permission because there was no written authority by the company to Allen (Allen, 1059-1060). Allen first had access to and examined checks and financial statements of Extension and Montana Leasing on January 15, 1949, in the district attorney's office and has not yet seen the checks and financial statements of Pilot, except one or two checks on a trip to the SEC at Seattle in May, 1947. He did get permission to have audit of these companies made by Randall, CPA, of which he received copies (Allen, 1060-1061).

Keane testified that the incidents which terminated his relations with Allen and Grismer were, first, when Allen called at his house late in November or early in December, 1946, after he (Keane) had run out of money of the Pilot, and quarreled with him in a noisy and belligerent manner and demanded that Keane turn everything over to him and he would take care of it, which Keane refused to do; secondly, on December 26, 1946, when Allen transferred the bank account of Lexington Silver-Lead by action of its board of directors in adopting a resolution to the bank stating who could draw checks; and thirdly, at the time when Joe Grismer, Mullen and Evans entered his office after it was

closed and removed some of the Extension books from his office—"that absolutely severed our last relation." (Keane, 661-662, 730-731).

(k) Settlement contract between Keane and Allen and trust agreement.

The settlement contract dated August 4, 1947, was an agreement between Keane and Allen for the settlement of a civil action at Wallace, Idaho, heretofore referred to, in the State Court brought by Keane against Allen, Grismer and others, involving the rights of Keane and Allen in certain mining stocks and properties, in which Allen denied all claims and charges made by Keane against him, particularly the claim that a partnership existed between them, while the trust agreement of the same date made by Keane and Allen as trustors established a trust for the payment of an indebtedness to Pilot of $73,664.33 and to Extension of $95,122.72 (Pltf's Ex. 130, admitted 1182; Keane, 1181-1187). The trust agreement was approved by Pilot and Extension (Allen, 1149).

Allen testified that Keane brought his action against Allen, Grismer and nineteen companies for a receivership on June 25, 1947, following an action brought in March or April for receivership against Independence and Keane, suits by Pilot and Extension instituted at Allen's direction through attorney Wayne against Independence and Keane for an accounting of moneys that Keane had diverted from these companies into his personal account and into settling lawsuits, and an action by Lexington Silver-Lead against Keane for an accounting, and the agreements referred to repre-

sent a negotiated settlement of this suit in order to compromise and protect Extension and Pilot (Allen, 1149-1153). Allen testified on cross-examination as follows:

"Q. Why did you sign this agreement if you were not responsible?

A. Because we had the interest of the stockholders and the corporations at heart, to clean them up, and it's the very thing that I had been trying to get Keane to do for a year and a half, to make such a disclosure and what money was his personal money and what belonged to corporations that he was in control of and handling the cash.

Q. So you were willing to sign an agreement to pay up indebtedness of the Lucky Friday Extension and the Pilot, although you were not a participant?

A. That is exactly right, and that agreement does not indicate that at all, Mr. Erickson; it indicates that these stocks are put in that trust for the purpose of liquidating the indebtedness, * * *

Q. So you feel you were not responsible in any way for the shortages to Lucky Friday Extension or the Pilot Silver Lead, but still you signed this agreement?

A. Absolutely right.

* * * * * *

Q. So that all these companies were interested in compromising the lawsuit, agreed to put up the stock to get rid of the lawsuit?

A. Exactly, and to make whole if they could the Pilot and Extension, because of Keane's defalcations in it.

Q. The other companies were interested in making good his defalcations?

A. When they were named in the lawsuit as having an interest in them by Keane, you can always effect a compromise." (1156-1157, 1159-1160.)

The court fairly instructed the jury on Pltf's Ex. 130 as follows:

"* * * personally I do not feel that that exhibit in any wise sufficiently weighs against the defendant to justify your returning any verdict against him on that account. It was a compromise, and it is generally the law that people make compromises for the purpose of settling that particular matter or matters, and that they do not expect to be held responsible on account of that settlement in some other transaction, and I'm letting you know that while you're free to give that exhibit the weight you think it is entitled to receive, that personally I consider that you'd be well justified in not holding that exhibit in any wise as against the defendant Allen." (1125.)

(l) Record conclusively established Grismer was not a conspirator.

Joe Grismer, miner, prospector, foreman and shift boss, was an experienced able mine operator of the Coeur d'Alene mining district, associated with operating mines of the district, a man of good character and proven ability and with a good mining reputation. He was mine superintendent of Callahan Consolidated, and was placed in charge of the mining operations of Extension and Pilot. He had lived at Wallace for about 33 years (Grismer, 382, 384, 386, 439, 452).

He located six mining claims for Extension and testified it was a mighty good piece of ground, he had

known of it for the past 25 years, and he wanted to see it developed because it had great possibilities as a mine; he entered whole-heartedly in the plan whereby he was to head Extension, take care of development, and the others were to look after all other details (384-387). He and his partners owned the Pilot group of claims for about 25 years, on which they had performed a great deal of work, and there was a mighty good showing, and when Pilot was organized, he was made mine manager; the finances were entirely out of his hands; he figured the board of directors of Pilot would play fair with everybody (393-395, 452).

Grismer's innocence of any complicity in the conspiracy charge of the indictment, and his ignorance of what was taking place with these companies was established by the government itself on his direct examination by his testimony as follows:

All negotiations by Extension with Big Friday for use of the latter's shaft were made in his absence; he was only slightly informed of what was going on, and did not know any details until the contract was brought to him for his signature as president (387). It came presumably from Keane's office because that is where everything was done (466).

He was never permitted nor had the opportunity of examining the books or anything of any kind, and therefore he would not know what took place; he never could get any information (388).

His participation in the preparation of Extension prospectus was very limited; he had no conferences

with attorney Johnston as to what went into the prospectus; he did not visit his office in connection with it (389-390).

He had no part in the handling of Extension funds which came from the brokers, wrote no checks, and had nothing to do with the company's financial affairs (390-393).

The matter of how Pilot's finances would be handled when the money was raised was entirely out of his hands (395).

He did not make the final arrangements for acquisition by Pilot of the Phelan and Cincinnati claims (396-397).

He visited attorney Johnston's office to furnish him with the history of the Pilot ground and its titles (400).

When in December, 1946, Pilot bills were not being paid and the money ran out, he never could get any explanation from Keane; it was always a run-around (407).

He had nothing to do with the issuance of cashier's check for $25,000 to Coeur d'Alene Mines for Coeur d'Alene Consolidated, nor with the committing of the money; he never discussed with anyone the raising of the money, but knew Coeur d'Alene Consolidated had to put down an amount similar to a guarantee for entering into an agreement with Coeur d'Alene Mines to start driving a long cross-cut on the 2,800-foot level of Coeur d'Alene Mines; he was not asked to put up any of that money and would not have it; he

heard no discussions as to where that money was to come from and had no knowledge whatsoever that $20,000 of that money came from the proceeds of Pilot's offering to the public, and any one who might have known that fact definitely did not advise him (411-412).

He received about $2,800 over a period of years from Extension for his monthly wages of $150 per month, and never received anything from Pilot on his agreed wages of $200 per month (414).

He had no knowledge that the funds of Extension and Pilot were being issued to Montana Leasing and other concerns; he never to his knowledge got any of these funds and had no knowledge of any of the financial affairs of the companies and was denied access to all books and records (419).

On December 12, 1946, he got action on Extension, of which he was president, by relieving Keane of his duties and responsibilities in connection with Extension, and on February 21, 1947, after employing attorney Wayne, he got Keane and his co-directors out of the Pilot (477; Deft's Ex. C).

In May, 1947, as president of Extension and Pilot, he authorized attorney Wayne to bring suit on behalf of these companies against Independence for an accounting of moneys received by that company from Extension and Pilot (Deft's Ex. C).

About the last of July, 1947, he caused audits to be made by Randall, CPA, of Extension and Pilot rec-

ords, which showed the misappropriation of large sums of money from the treasuries of both companies (Deft's Ex. C).

Grismer further testified that he proved to government counsel that he was not guilty of the first six counts of the indictment and he proved to his satisfaction that he was not guilty of the conspiracy count, but government counsel did not see it that way, and on January 12, 1949, the six substantive counts of the indictment were dismissed as to him, and he pleaded *nolo contendere* to the conspiracy count (49; Grismer, 420-422).

On the basis of the audit of Extension (Deft's Ex. T), and on behalf of that company he persuaded the prosecuting attorney of Shoshone County, Idaho, to swear to a complaint in the Probate Court of said county and have Keane arrested on a charge of embezzlement of the funds of said company, and upon the preliminary hearing, the prosecuting attorney failed to introduce in evidence said audit and to call Randall, then in Wallace, to prove the audit and moved dismissal of the charge on the ground that the evidence was insufficient to prove there was probable cause to believe a crime had been committed and the charge was dismissed (Deft's Ex. C; affidavit of Grismer, page 3, admitted 463, 459), the facts in which affidavit sworn to February 15, 1949, Grismer stated to be very much the truth (462).

We urge the court to consider most carefully this affidavit as well as the impromptu statement made by

Grismer at the meeting of stockholders of Pilot on August 7, 1948, which was brought out on cross-examination by defendant's counsel (451-460), and which we have taken the liberty of inserting in the Appendix to this brief in full.

Grismer was the innocent victim of the prosecutor's scatter-gun to bring down the defendants and we believe he was included as a defendant in the indictment for procedural or strategy purposes only in order to carry on the proof of an alleged continuing conspiracy between Allen and Grismer down to the return of the indictment and long after Keane's evidence completely terminated a conspiracy, if there was one, on December 26, 1946.

The stigma of a convicted felon placed on Joe Grismer, which not only affects Grismer, but also his wife and two grown sons (408) is without any justification whatsoever and is not based upon the record evidence.

Judge Black said that Grismer was substantially a "dupe," a minor cog in the machine, a rather inconsequential participant, and that it was never intended, so far as the evidence shows, that he was to get anything much more than a job (1287, 1290).

At the time Judge Driver heard the offer of Grismer's lawyer for permission to enter a *nolo contendere* plea to the conspiracy count only, the United States district attorney stated to the court that, as to the Exension, Grismer never participated, he never got anything except his salary; of all the moneys that were raised for Extension, he only received a salary; as to

the Pilot, he was foreman in charge of operations, he put up the mining claims and he only was compensated for his actual work there, and there is still due him some salary for the work he did on the Pilot; that Grismer never got any of the money that was diverted from these companies except to meet the payrolls so that he did not profit. His conduct was more of negligence or carelessness than anything else, and

> "I will say further that it is my belief that he's an uneducated man, that he's a practical miner; he knows how to drive a tunnel and sink a shaft, but he doesn't know anything and never did pretend to know anything about business and financing a mining company." (50-52.)

Judge Driver had said that Grismer's part in the whole transaction was a minor one and that he was rather a "cat's paw" of one or more of the other defendants (62), and the court suspended sentence on Joe Grismer and placed him on probation for a period of two years (118, 122.)

INSTRUCTIONS

The court instructed the jury at the close of all the testimony (1195-1240) with what he admitted to be long, difficult and complicated instructions, to which instructions exceptions were taken by defendant before the jury retired to consider its verdict (1242-1245).

The court at that time instructed the jury, in effect, that it could only find defendant Allen guilty in the event he knowingly, wilfully and intentionally devised, joined or participated to a reasonably substantial degree in the conspiracy alleged in Count VII, and that

such conspiracy was for the purpose of doing one of the *essential elements* of the scheme to defraud, to-wit:

1. Joining or participating in any scheme to defraud purchasers or prospective purchasers of stock of Extension and Pilot, or either thereof, and to conceal the fact that he was a promoter of said companies or either thereof, and that he was such a promoter before or during their organization;

2. Participating in such scheme, knowing and intending that Extension and Pilot, or either thereof, were to sell stock to investors upon the representation that the proceeds thereof would be used by said corporations for the exploration and development of their mining properties and that, in fact, to defendant's knowledge such proceeds were not so used;

3. Joining or participating in such scheme with the intention that a portion of the money due the corporations from their treasury stock would be appropriated and diverted from Extension and Pilot, or either of them;

4. Joining in such scheme as to Extension and Pilot, or either thereof, intending and agreeing that certain stock in said companies, or either of them, would be given to any attorney or attorneys under the pretense that it was for attorney's fees, but that actually a part of it would come back to him as a promoter for the purpose of defrauding the public;

Provided, however, that the evidence established beyond all reasonable doubt that Allen helped, joined

in, or participated in such conspiracy knowingly, wilfully, and intentionally before the doing of at least one overt act in Spokane, Washington, in order to give the federal court in the State of Washington jurisdiction (1234-1235, 1237).

The court also instructed the jury, in effect, that the proof to their satisfaction of any portion of the charges other than one or more of the essentials just mentioned would not justify conviction, but if the jury found beyond all reasonable doubt one or more of said essentials, coupled with knowingly, wilfully and intentionally devising, joining or participating in the scheme or conspiracy, and thereafter the doing of at least one overt act in Spokane, Washington, such would substantiate conviction (1246).

The court also instructed the jury that neither the testimony of Keane nor Grismer was necessary to the government's case against Allen, provided the jury was convinced beyond all reasonable doubt of Allen's guilt from the other testimony (1229-1230), to which defendant's counsel excepted, inasmuch as the instruction permits the jury to find defendant guilty of a conspiracy without the testimony of Keane or Grismer, whereas and under the state of the record there is no sufficient direct evidence without the use of the testimony of Keane or Grismer to establish the elements of the conspiracy charged, and that to find the elements of that conspiracy by circumstantial evidence, the jury should have been advised that such circumstantial evidence to establish that element must be con-

sistent with but one hypothesis or one theory, namely, guilt beyond a reasonable doubt, and cannot be consistent with innocence (1244).

The morning after the case was submitted to the jury and had been argued by counsel for both sides, and the jury had not then agreed upon a verdict, the court read to counsel a set of further instructions which he desired to give the jury for the purpose, as the court said, of narrowing the issues as to each count (1250-1251), to which defendant's counsel objected and stated:

> "* * * we do not believe that minds of the laymen, and I think that also applies to the mind of a lawyer, can grasp a copious set of instructions as has been given by the court as necessary in these cases under the law, and the giving of specific instructions at a later time we believe would cause the jury to overlook the force and effect of previous instructions given, and we certainly want the record to show that the defendant feels that his defense will be materially prejudiced if these instructions are given, and for those reasons." (1253-1254.)

The court then stated he would not insist upon giving such further instructions to the jury at that time "or until the jury may request instructions, if it so does" and summarized defendant's counsel's objections as follows:

> "The substantial objections of the defendant to the suggested instructions of the court are that to give the instructions at this time without a request by the jury will do two things: first, confuse the jury, and second, accentuate in the jury's minds these instructions given without the instruc-

> tions given yesterday, the general instructions which would remain in effect * * *." (1255-1256.)

More than twenty-four hours after the case had been submitted to the jury, and the jury had been deliberating on their verdict during said time, the jury returned into court and asked the court if the first paragraph of Count I of the indictment was incorporated in each of the other counts and to which the answer was simply that it was (1264-1268), and after the jury had already been thoroughly instructed on all counts and the jury did not indicate confusion as to the law and the need of further instructions, the court proceeded to give to the jury another set of long, difficult and complicated instructions on the premise that there were two problems troubling the jury, one, whether or not defendant was charged seven times with the same offense, and the other, whether or not it was necessary for the government to establish in connection with each count each and every allegation of the first paragraph of the first count (1269).

At this point it will be noted that the court had already told the jury that as to the mail fraud Counts I to III, inclusive (1205), as to the security fraud Counts IV to VI, inclusive (1206), and as to the conspiracy Count VII (1237) and particularly as to the several features of the scheme to defraud described in the first count of the indictment (1213, 1246), it was not necessary for the government to prove beyond a reasonable doubt all elements of misrepresentation, false pretenses or promises charged but only some of

the essential ones which the court specifically enumerated in the instruction on page 1234 of the Record.

Nevertheless, at this stage of the proceedings, the court then told the jury that defendant Allen was not charged seven times with the same offense and that it is not necessary that the government in connection with each of the subsequent counts prove every allegation in the first paragraph of the first count, and the court then gave to the jury long and complicated additional instructions to which defendant's counsel excepted to the effect that the answer was so concealed by divers, numerous, and extensive other instructions as to elements not inquired of by the jury as to wholly conceal the answer to the question propounded by the jury and that they served only to further perplex and confuse the jury and to re-impress upon their minds the essence of the instructions commonly known as "plaintiff's instructions" (1263-1279).

The jury had this cause under deliberation from Friday at about 7:00 P. M. (1250) until Sunday at about 10:30 P. M. (1282).

We appreciate the difficulty which the court had in instructing the jury under the seven counts of the indictment as drawn. The court was perplexed as to how to state the nature of the scheme to defraud in Count I in concise language when the following occurred between the district attorney and the court just before the latter instructed the jury for the second time:

"Mr. Erickson: I might state this, that I believe that your Honor should instruct the jury that the scheme is set forth in Count I in detail, and define what that scheme is again in as short, concise language as possible, and then state that the other counts incorporate that same scheme by reference, and that the various respective counts, other counts, charge that the same scheme was used as Count I, to mail letters on the other dates mentioned in the other respective counts.

"The Court: Well, counsel, I'm in somewhat of unison with your views, except I'm not satisfied of my ability to state the nature of the scheme in Count I in concise language. * * * (1266.)

QUESTIONS INVOLVED AND MANNER IN WHICH RAISED

The foregoing Statement of the Case raises questions as to (a) the sufficiency of the evidence to convict Allen on the conspiracy count; (b) as to whether the conspiracy, if any existed, was a continuing, unbroken one as alleged or whether it was terminated December 26, 1946, as testified to by Keane, or whether it continued on between Allen and Grismer after that date as a part of the original conspiracy, or as to whether there were two separate conspiracies, one between Keane, Allen and Grismer to December 26, 1946, and one between Allen and Grismer after that date, and was Grismer, under the uncontroverted evidence established by the government, actually a party to any conspiracy composed of Allen and Keane, if one existed, and if not, then did the court err in permitting the introduction of evidence as in furtherance of an alleged conspiracy between Allen, Keane and Grismer, or Allen and Keane, as to anything done by Allen and

Grismer after December 26, 1946, and did the court err in failing to instruct the jury accordingly; (c) as to whether the court erred in instructing the jury that neither the testimony of Keane, nor Grismer, was necessary to the government's case against Allen, and in giving to the jury a second set of instructions twenty-four hours after the case had been submitted to it under the circumstances and conditions heretofore pointed out; (d) as to whether, where the government supports the alleged scheme to defraud set forth in the conspiracy count of the indictment with the same evidence, the same allegations, covering the same time, set forth in the substantive counts and jury acquits defendant Allen of all substantive counts and convicts said Allen of conspiracy count, said verdict of conviction of Allen of the conspiracy count was inherently under such circumstances not only inconsistent, repugnant and therefore void, but whether it lacks sufficient evidence to sustain a conviction on the conspiracy count, was the conspiracy count improperly included in indictment, and is such a verdict in violation of Amendment V of the Constitution of the United States; and (e) whether the conspiracy conviction of Allen should be upheld where prosecution for substantive offenses was adequate and purposes served by adding conspiracy charge was to get procedural advantages over defendant to ease way to his conviction.

The manner in which these questions were raised was by the evidence and objections thereto, motions for entry of judgment of acquittal at close of plain-

tiff's case, at close of all testimony, and renewal of such motions, motion to strike from evidence all exhibits and testimony relating to matters occurring after December 26, 1946, motion for judgment of acquittal or for new trial, motion in arrest of judgment, the first instructions to the jury given at the close of all the testimony and exceptions thereto, the giving of second set of instructions as heretofore stated and exceptions thereto, verdict, judgment of conviction and commitment, indictment, and government procedure at trial.

SPECIFICATION OF ERRORS

1. The District Court erred in overruling objection of defendant to the testimony of the witness Irene Vermillion in identifying Plaintiff's Exhibits Nos. 1 to 6, inclusive (checks of brokers deposited in bank account of Extension, deposit slips and check stubs of Extension, and checks drawn on Extension account), and all similar documents and exhibits identified in the same manner or offered in evidence, on the ground that they are incompetent, irrelevant, and immaterial, no proper foundation has been laid in this respect, the exhibits do not appear to be in the handwriting of defendant, nor to have thereon endorsed the signature of defendant; that the state of the record is such that the responsibility of the defendant or the connection of the defendant with these exhibits has not been shown; that, as to the defendant in the present state of the record, all these exhibits are hearsay; that the evidence is insufficient to establish a conspiracy and to make these exhibits competent on the theory of an act of a co-conspirator, and that the exhibits leave the jury to surmise and to speculate in respect to their competency and effect (158-159).

2. The District Court erred in admitting in evidence, during the testimony of witness Nolting and after defendant Grismer had testified, over objection of defendant, Plaintiff's Exhibit No. 72 (Gibson's ledger sheet, account of B. A. McLean) and Plaintiff's Exhibit No. 48 (six checks E. J. Gibson and Co. to cash and B. A. McLean, 1/20/47 to 9/26/47), on ground

that as to Exhibit 72 no proper foundation has been laid, not connected up in any way to prove any allegation of any count in indictment against defendant Allen, nor does it show any privity of transaction of said defendant as related to any count in indictment and it is incompetent, irrelevant and immaterial at this time, and that as to Exhibit No. 48 on the face of the exhibit each and every check so designated, beginning with January 20, 1947, and going through September 26, 1947, is incompetent, irrelevant and immaterial to prove any issue made in this case as to the joint concert alleged in counts I to VII of indictment, including those on mail fraud, security fraud and conspiracy, and on the ground that the evidence has already disclosed, and there is no contradiction that there could not have been any joint concert of action between defendants after witness Grismer and defendant Allen had thrown out or demanded and secured the resignation of Keane who is charged as an actual accomplice in all the general counts of indictment running up to present time, and that these exhibits on no theory can prove any count set forth in indictment beginning January 20, 1947; that there is no allegation there was any concert of action between Allen and Grismer and as to Grismer six counts alleging such concert of action have been dismissed; that the indictment as to every count alleges prior to June 1, 1945, and continuing to date of indictment naming each and every one of defendants as being co-conspirators with no allegation at all made that there was ever any conspiracy, so-called, existing between two separate de-

fendants beginning at any particular time, but that it was a continuing conspiracy between all three, and on the further ground that there is no connection of these checks on their face or in any other way or of the testimony developed so far with defendant Allen; and on the additional ground (when Exhibit No. 48 was reoffered and admitted upon witness Keane's redirect examination) that on the face of each and every one of these separate items that appear in the exhibits are dates starting with the end of January, 1947, and extending as far as September 26, 1947, and on the testimony of the witness Keane himself that he considered there was no agreement or otherwise, assuming that there ever was, which this defendant denies, between him and Allen after the fall or early fall of 1946, and based further upon the testimony adduced with respect to said witness Keane and defendant Grismer that no conspiracy then could exist so far as defendant Grismer was concerned and that it is within the exempted transaction, having been made over a year after the original offering, and not claimed that it is treasury stock (493-496, 769-771).

3. The District Court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 104 (confirmation of sales by Hogle & Co. at Butte, Montana, of Extension stock, account of J. A. Allen) and Plaintiff's Exhibit No. 105 (check of $6,872.95 of Hogle & Co. mailed to J. A. Allen December 3, 1945) on ground the exhibits are incompetent, irrelevant, and immaterial to prove any issue in this case; it is not

joined up, and no proper foundation has been laid; and the signature on the check was afterwards proved by appellant's testimony to have been forged by Keane (818, 825).

4. The District Court erred in overruling and denying the motion of defendant, made at the close of plaintiff's case and after counsel for plaintiff announced that plaintiff rested, to strike from the evidence in this cause all exhibits identified and admitted in evidence or identified or admitted in evidence pertaining to and relating to any transactions which said exhibits tend to prove and establish transpiring and occurring or alleged to have transpired or occurred subsequent to December 26, 1946, as well as all testimony relating to matters and things alleged to have transpired or occurred or which said testimony tends to prove transpired or occurred subsequent to December 26, 1946, and heretofore objected to by counsel for defendant on the following grounds, to-wit:

First, that the evidence affirmatively shows and discloses that subsequent to said December 26, 1946, as appears from plaintiff's evidence, and particularly from evidence of government's witness Francis Clayton Keane, no conspiracy existed or could have existed between this defendant and said defendant Francis Clayton Keane, or between this defendant and the defendant Joseph Valentine Grismer, or between any two or more of said three defendants, and that the evidence in behalf of plaintiff affirmatively discloses and shows that said defendant Joseph Valentine Grismer

was at no time a party to or a participant in the alleged conspiracy set forth in the indictment; that said evidence is incompetent for any purpose in the absence of affirmative proof on the part of plaintiff that at any time subsequent to December 26, 1946, the conspiracy alleged in the indictment was still in existence and it appearing from the evidence that defendant James Anthony Allen and defendant Francis Clayton Keane at no times subsequent to December 26, 1946, were on friendly relations or did conspire or scheme together to do any act unlawful or otherwise, and

Secondly, because it affirmatively appears from testimony adduced from witnesses who have been called and testified on behalf of the government that said Joseph Valentine Grismer could not be and was not a party to any conspiracy whatsoever at the time of the inception of any conspiracy as alleged in the indictment against this defendant Allen and said Francis Clayton Keane and Joseph Valentine Grismer, and therefore could not conspire with or be a party to the conspiracy as alleged in said indictment with said defendant Allen after December 26, 1946 (71, 935).

5. The District Court erred in overruling and denying the motion of defendant, made at the close of evidence and testimony on behalf of plaintiff and after counsel for plaintiff announced that plaintiff had rested and had completed its case in chief, to have the court order the entry of a judgment of acquittal of all offenses of any kind or nature as charged, alleged and laid in each and every one of the counts in said indict-

ment against said defendant (omitting herefrom all counts on which defendant Allen was acquitted) on the ground that plaintiff has wholly and completely failed to prove and establish beyond a reasonable doubt all the material facts and allegations alleged in Count 7 of the indictment to support any charge of crime alleged therein, and that as to Count 7 of the indictment, the testimony of the accomplice, defendant Francis Clayton Keane, fails to establish any conspiracy as charged in the indictment, if credible, and in any event that the character of said witness is such under the evidence that his testimony is wholly insufficient and incredible to establish a conspiracy as alleged in Count 7 or to connect this defendant therewith (83, 936).

6. The District Court erred in overruling and denying the motion of defendant, made at the close of the evidence and testimony on behalf of plaintiff and defendant Allen and after respective counsel for both parties have stated to the court that each of said parties had rested and completed its case, to have the court order the entry of a judgment of acquittal of all offenses of any kind or nature as charged, alleged and laid in each and every one of the counts in said indictment against said defendant (omitting herefrom all counts on which defendant Allen was acquitted) on the ground that plaintiff has wholly and completely failed to prove and establish beyond a reasonable doubt all the material facts and allegations alleged in Count VII of the indictment to support any charge of crime alleged therein, and that as to Count VII of the in-

dictment, the testimony of the accomplice, defendant Francis Clayton Keane, fails to establish any conspiracy as charged in the indictment, if credible, and in any event that the character of said witness is such under the evidence that his testimony is wholly insufficient and incredible to establish a conspiracy as alleged in Count VII or to connect this defendant therewith (85, 1191).

7. The District Court erred in instructing the jury, at the close of the testimony on behalf of plaintiff and defendant, as contained in Transcript of Record, Volume 3, pages 1195 to 1240, and in Appendix, pages 116 to 164, to which the defendant then and there objected and excepted before the jury retired to consider its verdict, in the following particulars, namely,

(a) That the form in which the instructions were given tend to permit the jury to convict for aiding and abetting without participating in a conspiracy.

(b) That the instructions permit the jury to find the defendant guilty of a conspiracy without the testimony of Keane or Grismer, whereas and under the state of the record there is no sufficient direct evidence without the use of the testimony of Keane or Grismer to establish the elements of the conspiracy charged, and that to find the elements of that conspiracy by circumstantial evidence, the jury should have been advised that such circumstantial evidence to establish that element must be consistent with but one hypothesis or one theory, namely, guilt beyond a reasonable doubt, and cannot be consistent with innocence.

8. The District Court erred in again instructing the jury at length, as set forth in Transcript of Record, Volume 3, pages 1269 to 1277, and in Appendix at pages 164 to 171 (after the jury had been deliberating on its verdict more than sixteen hours after the case had been submitted to it and had not then reached an agreement on its verdict, and the court had submitted to counsel a set of further instructions which he desired to give the jury for the purpose, as he said, of narrowing the issues, to which defendant's counsel objected on the ground that the giving of specific instructions at that time would only confuse the jury and cause the jury to overlook the force and effect of previous instructions given and that defendant's defense would be materially prejudiced thereby and that the court then stated he would not insist upon giving such further instructions to the jury, unless the jury requested further instructions, and after the jury had been deliberating on its verdict for more than twenty-four hours after the case had been submitted to it and had not agreed, and returned into court and asked the court in effect if the first paragraph of Count I is repeated by reference in each of the other counts of the indictment, and to which the answer was simply that it was, and after adjournment for an hour and a half and after the jury had been thoroughly instructed on all counts, and the jury did not indicate confusion as to the law and the need of further instructions from the court) to the giving of which instructions at said time the defendant then and there objected and excepted on the grounds and for the reasons that said

additional instructions do not in direct, simple and understandable language to a layman answer the one simple and direct question asked by the jury; that while the gist of the answer is contained in the additional instructions, the answer is so concealed by divers, numerous and extensive other instructions as to elements not inquired of by the jury as to wholly conceal the answer to the question propounded by the jury, and the remaining portions of the additional instructions are not the answer to the direct question of the jury, but are in answer to a condition of mind which the court assumed the jury entertained not directly disclosed by their question, the court assuming there were two problems troubling the jury, one whether or not the defendant is charged seven times with the same offense, and the other whether or not it is necessary for the government to establish in connection with each count each and every allegation of the first paragraph of the first count, and that thereby the additional instructions given by the court tend to distract the minds of the jury from their duty as deliberators, and from the answer which they sought to have elicited, and tend to accentuate the particular matters to which the additional instructions relate, and serve only to further perplex and to confuse the jury and to reimpress upon their minds the essence of the instructions commonly known and referred to as "plaintiff's instructions," that is, instructions usually tendered by plaintiff in a criminal case, and tend to single and point out certain matters and things to be proven which it must be assumed the jury understood, or they would

have, when asked if there was further confusion, stated to the court, and that further, in an instance or two in the court's additional instruction, and in dwelling upon the essential elements to be proven in relation to the various counts, the court omitted to state in connection with each count that one or more of the objects of the scheme and the scheme itself set forth in paragraph 1 of each count of the indictment, must be proven in connection with each and every overt act committed and in connection with the indictment; that there were some defects in the instructions given by the court at the close of the case and the additional instructions are in some respects in conflict with the instructions previously given by the court; that a jury of laymen cannot possibly differentiate between those portions of the law set forth in the first set of instructions and those portions of the law as set forth in the second set of instructions to which the said second set of instructions apply and modify; that the additional instructions can do nothing but confuse the jury, are not of aid to the jury and minimize the force and effect of the first instructions requested by defendant and given by the court or given by the court of his own motion, securing to the defendant the right of proper consideration of his case by the court and of a fair trial; that the mind of the layman, as well as the mind of a lawyer, cannot grasp a copious set of instructions as has been given by the court as necessary in these cases under the law and where the indictment contained seven different counts, and the giving of specific instructions at a later time would cause the jury

to overlook the force and effect of previous instructions given, and that the defense of the defendant has been materially prejudiced by the giving of the subsequent and later instructions. In other words, the jury in this case has had submitted to it at two different times two sets of instructions which are in some respects conflicting and contradictory and have greatly confused the issues to the material prejudice of defendant and his defenses.

9. The District Court erred in overruling and denying the motion of defendant, made upon return of the jury's verdict and the polling of the jury, renewing the motions of defendant for judgment of acquittal submitted to the court at the close of the government's case (83, 936) and at the close of all the testimony on behalf of both plaintiff and defendant Allen (85, 1191), as to Count VII of the indictment, the defendant having been found not guilty of all other counts of the indictment (1284).

10. The District Court erred in denying the motion of the defendant that the verdict of guilty returned against him by a jury in this court on Count VII of the indictment on June 19, 1949, be arrested and that no judgment and sentence be imposed thereon for the following reasons, to-wit:

(a) That the offense alleged and set out in Count VII was not and has not been proved as against the defendant by any competent or legal evidence, or any evidence whatsoever;

(b) That the finding of the jury that defendant herein was guilty upon Count VII was and is wholly and inherently inconsistent and wholly and completely repugnant with, and to, its finding of not guilty upon Counts I, II, III, IV, V, and VI of said indictment, and that there was not and is not any legal evidence or any evidence whatsoever to support the verdict of the jury on Count VII of the indictment other than the exact and self-same facts alleged and pleaded in detail and received in evidence in support of the other counts, namely, Counts I, II, III, IV, V, VI, which were likewise pleaded in the same exact detail in support of Count VII; that the jury in view of and after consideration of all of the self-same and exact facts and allegations pleaded in detail in Counts I to VI of the indictment and repeated in Count VII found the defendant not guilty upon each and every one of said Counts I to VI, inclusive, and upon the facts pleaded in support of said counts; and therefore all of said facts in Counts I to VI should be eliminated in *toto* when considering said Count VII; that this being done, there was, and is, no legal evidence or evidence of any kind whatsoever in fact or law to support the verdict in any manner whatsoever on Count VII; and,

(c) That there was and is no evidence in view of the above sufficient to prove that the defendant did commit or has committed any offense against the United States of America, as to Count VII of the indictment (91, 1285).

11. The District Court erred in denying the mo-

tion of the defendant to have the court order a verdict of not guilty as to him on Count VII of the indictment herein, or for a new trial as to Count VII, on the grounds set forth in Specification of Errors No. 10 and the additional grounds as follows:

(a) The verdict of the jury on Count VII is contrary to the evidence in this cause and the law.

(b) Errors by the court in the reception and exclusion of evidence were prejudicial to the defendant.

(c) The court erred in its charge and instructions to the jury.

(d) That no conspiracy in view of the grounds set forth in Specification of Errors No. 10 has been proved by the government and the government has failed to prove any criminal intent or either separate or joint and concerted criminal action on the part of defendant, and has failed to connect the defendant in any manner whatsoever with the crime set out in Count VII in view of and because of the grounds set forth in Specification of Errors No. 10.

12. The District Court erred in submitting the case to the jury and in entering the judgment and imposing a sentence in the manner and form as the evidence is wholly insufficient to support a verdict or a judgment based thereon.

The said evidence is insufficient so far as defendant Allen is concerned in that it fails to show:

(a) Any agreement, express or implied, by defen-

dant Allen with either or both of the other two defendants to conspire or combine or confederate or agree with each other to violate the Mail Fraud statute or the National Securities Act.

(b) Any wrongful or unlawful intent or purpose on the part of defendant Allen to defraud purchasers of stocks of Extension or Pilot companies or to obtain money or property by any unlawful means whatsoever in the sale of said stocks or otherwise.

(c) The evidence is insufficient to show that defendant Allen promoted or organized Extension or Pilot companies or that he caused to be issued a large portion of the stock of these corporations to himself or any one for or on his behalf or that he or any one for or on his behalf concealed or had reason to conceal his connection with said companies or the receipt by him of any part of the stock of said companies to be taken by the promoters or organizers thereof.

(d) That this defendant Allen had anything to do with the issuance of large blocks of stock in said companies to the attorneys mentioned in the indictment in this case under any pretense whatever that said stock was in payment of attorney fees in order to conceal the true amount of stock issued to defendants or for any secret arrangements of any kind whatsoever.

(e) That this defendant Allen had anything to do with the sale of stock in said corporations to investors or in connection therewith made any representations whatsoever as to the use of the proceeds therefrom for

the exploration or development of the mining properties of said corporations.

(f) That this defendant Allen appropriated or diverted from said corporations a large or any amount of such corporate moneys to his own use or benefit.

(g) That the defendant Allen defrauded any purchasers of stock of Extension or Pilot by any unlawful means whatsoever—

(1) As to use of net proceeds to be received from sale of Extension or Pilot stock by said corporations.

(2) As to the names of the promoters or persons in control of said corporations.

(3) As to the fact that promoters would hold their stock for investment.

(4) As to amounts of stock issued to promoters or for legal services.

(h) The evidence is insufficient to show that this defendant Allen, or any person for or on his behalf committed any of the overt acts set forth in Count VII of the indictment in furtherance of any conspiracy or to effect any of the alleged objects thereof.

(i) The evidence is insufficient to show a continuing conspiracy as alleged in the indictment commencing prior to June 1, 1945, and continuing to the date of the indictment so that even conceding there might have been a conspiracy, all relations between defendants Keane and Allen were terminated, according to the testimony of defendant Keane, by a quarrel between

them in November, 1946, by the transfer in December, 1946, of the Lexington bank account by having its directors provide who could endorse checks and by the entry of defendant Grismer and others into Keane's office and the removal of Extension books therefrom, and said alleged conspiracy exhausted itself in December, 1946, and was supplanted by an alleged new conspiracy starting in December, 1946; in other words, there were two separate, disconnected, distinct and independent conspiracies, if any at all.

(j) That the evidence is insufficient to show any confederacy or combination or agreement between any of the defendants looking to a conspiracy to violate the Mail Fraud statute or the National Securities Act, as charged.

(k) The evidence is insufficient to establish the crime alleged in Count VII of the indictment against this defendant Allen (Transcript of Record, Point No. 74, 1340).

ARGUMENT

POINT I

Allen did not conspire with Keane and Grismer, or either of them, to violate the mail fraud statute or the National Securities Act, as charged in Count VII of the Indictment.

As announced by the Supreme Court of the United States, speaking through Justice Jackson, in his concurring opinion in *Krulewitch v. United States,* 336 U. S. 440, 69 S. Ct. 716, 93 L, ed. 790, 799:

> "When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly, the prosecution should first establish *prima facie*

> the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. In other words, a conspiracy often is proved by evi dence that is admissible only upon assumption that conspiracy existed. The naive assumption that prejudicial effects can be overcome by instructions to the jury, cf. *Blumenthal v. United States,* 332 U. S. 539, 559, 92 L. ed. 154, 169, 68 S. Ct. 248, all practicing lawyers know to be unmitigated fiction."

In the case at bar, there was no reason why the government could not have followed this orderly manner of putting in its evidence because defendant Keane, who testified to the gist of the alleged conspiracy as between him and Allen, was available to the government all through the trial; it was Keane who furnished evidence to and assisted the government in the preparation of this case for trial (834, 908-909, 920, 924). The government, however, called Keane to the stand after fifteen witnesses had testified, causing defendant to make numerous and lengthy objections to evidence, and that the jury was left to surmise or speculate as to the competency and effect of the exhibits made prior to and during Keane's examination, causing the court to reserve many of his rulings on evidence, so that, after Keane had testified, a mass of evidence was finally admitted, causing defendant's counsel in

many instances to lose track of the original objections made at the time when the evidence was first offered and ruling reserved. Under other situations, perhaps, the rule of order of introducing evidence as to conspiracy is substantially subject to the court's discretion; the building cannot all be built at once; a brick at a time must be laid (Black, 154), but that was not the situation in this case.

There was never any doubt of Keane's guilt of the crime of embezzlement of Extension and Pilot funds (Deft's Exs. T and U), for which crime he has never been punished nor disbarred.

In 1948 Grismer as president of Extension tried to have Keane prosecuted for embezzlement of Extension funds based on Extension audit, in the Probate Court of Shoshone County, Idaho, in a preliminary hearing to determine whether or not he should be bound over to the District Court, and got the brush-off from the Prosecuting Attorney (Deft's Ex. C, 451-460, 462-463). The government in no wise backed up Grismer in this effort, but kept the basic records which it had obtained from Keane on which to put Keane behind the bars on an embezzlement charge so that it could prosecute Keane, Allen and Grismer in the federal court on the charges set forth in the indictment.

As Justice Jackson says in the Krulewitch case, *supra*:

> "* * * the minimum proof required to establish conspiracy is extremely low,"

and

> "There is, of course, strong temptation to relax rigid standards when it seems the only way to sustain convictions of evildoers. But statutes authorize prosecution for substantive crimes for most evildoing without the dangers to the liberty of the individual and the integrity of the judicial process that are inherent in conspiracy charges. We should disapprove the doctrine of implied or constructive crime in its entirety and in every manifestation. And I think there should be no straining to uphold any conspiracy conviction where prosecution for the substantive offense is adequate and the purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction."

That is exactly what occurred in this case; the conspiracy count enabled the government to introduce, not only Keane's direct evidence of an alleged agreement with Allen after the testimony of fifteen witnesses, but also a mass of circumstantial evidence, all of which was being put before the jury for it to surmise and speculate over, before the stellar witness for the government appeared upon the scene.

The evidence for and on behalf of defendant Allen has been thoroughly set forth in the subject of this brief entitled "The Evidence" in the Statement of the Case and will not again be discussed in detail, except to point out that the undisputed evidence established conclusively that Keane, the astute lawyer and counselor at law, who was forming lots of corporations and doing a lot of legal work (1044-1045), incorporated and organized Extension and Pilot, that he and his assistants Vermillion and Evans handled all financial and stock transactions; that all stock and financial

records for these companies were kept in his office, and according to Grismer, that is where everything was done; that Allen was not a promoter of these companies and made none of the representations in their prospectuses; that in addition to the three-way project for the deep development of Hunter Creek, Extension and Big Friday, he was vitally interested in the nucleus of the whole thing, a large, extensive, and deep development program called the Big Hunter project with the Gold Hunter as the axis, which involved a consolidation on this central development of many mining properties in that section of the Coeur d'Alene Mining District; and that the mining activity and the negotiations then going on for deep development and consolidation of mining properties in that area commencing in 1945 caused repeated rows and fights and Allen, according to attorney Johnston, was the arbitrator, administrator and conciliator (Johnston, 580-592; Grismer, 449-451; Herrick, 301-303; Allen, 1032-1036, 1047-1051, 1104-1105). It was Keane, and not Allen, who made the kick-back deals with attorneys Gyde and Johnston (Gyde, 278-279, 280-283; Pltf's Exs. 30, 31, 31a; Johnston, 545-547, 556, 576; Pltf's Ex. 8-L-1).

While the indictment repeatedly stated that the purpose of the alleged scheme or conspiracy was to defraud purchasers or prospective purchasers of stock in Extension and Pilot, thereinafter referred to as investors, the government did not produce a single investor in stock of said companies to testify against Allen.

It was not contended by the government that the properties of Extension and Pilot were without merit; in fact, government counsel stated at the time Keane's plea of *nolo contendere* was before the court they had been informed that "both of these properties had merit" (Stocking, 40).

After Keane had embezzled all of the funds of Extension and Pilot, Allen was elected President of Extension, August 8, 1947 (1053), and President and Treasurer of Pilot on August 7, 1947, and re-elected to such positions of trust and responsibility following a stockholders' meeting on August 10, 1948 (1022, 1140).

The sufficiency of the evidence to convict Allen on the conspiracy count is attacked in Specifications of Errors Nos. 5, 6, 9, and 10 to 12, inclusive.

We are confident that this Court will not hold Allen responsible for the infamous crimes committed by attorney Keane while acting in a trust capacity for Extension and Pilot, who pleaded *nolo contendere* on five of the six substantive counts and on the seventh count, conspiracy, and when sentenced, walked out of the federal building a free man and practicing attorney, with a fine of only $1,500 payable in installments and an admonition by the court not to drink intoxicating liquors for two years, a "severe" punishment indeed for committing such infamous crimes and a "shining" example as to how far a lawyer can go in embezzling trust funds without being locked up in the penitentiary.

POINT II

Conspiracy as charged between Keane, Allen, and Grismer terminated December 26, 1946, and did not continue after that date. There were two separate conspiracies, if any at all.

Count VII charged a conspiracy between Allen, Keane and Grismer beginning at some time prior to June 1, 1945, and continuing to date of indictment (2, 10). A similar charge was made as to the same three defendants in an alleged scheme to defraud set forth in each of the other counts. No allegation is made that there was ever any conspiracy existing between two separate defendants beginning at any particular time, but that it was a continuing conspiracy between all three defendants. No allegation is made of any concert of action between Allen and Grismer. All of the six substantive counts charging a concert of action between Keane, Allen and Grismer were dismissed as to Grismer (53) and the trial resulted in Allen's acquittal of all six substantive counts (88). Keane, however, stands convicted upon his plea of *nolo contendere* of the offenses of Using the Mails to Defraud, Fraud in Sale of Securities, and Conspiracy, as charged in Counts I, II, III, IV, V, and VII (120).

Grismer testified on cross-examination that he had made the statements contained in his impromptu speech to the stockholders of Pilot at their meeting on August 7, 1948, advising them of the severance of all relations by him and Allen with Keane the latter part of December, 1946 (451-460, Appendix page 108), and that it was a truthful statement (461), and that the allegations in his affidavit sworn to February 15, 1949

(Deft's Ex. C), as to his actions in ousting Keane from Extension, December 12, 1946, and Pilot, February 16, 1947, securing audits of Pilot and Extension records in July, 1947, and having Keane arrested for embezzlement of Extension funds in 1948, at Wallace, Idaho, were very much the truth (462, 480). Such actions were taken by Allen and Grismer upon discovery of Keane's defalcations of Extension and Pilot funds, the amounts of which were later determined when the audits were made (1079-1167, 407, 456).

Following Grismer's testimony, the first objection made by defendant Allen and overruled by the court was to the introduction of Pltf's Ex. No. 48 (Spec. of Errors No. 2) during the testimony of Nolting, being checks of E. J. Gibson & Co. to cash and B. A. McLean (French) January 20 to September 26, 1947, on the ground that on the uncontroverted evidence of Grismer the exhibit could not prove any count in the indictment beginning January 20, 1947, and no concert of action alleged between Allen and Grismer. Later, after Keane testified, and Pltf's Ex. No. 48 was re-offered and readmitted on Keane's redirect examination, defendant's objection was then that Keane had testified there was no agreement between him and Allen (if there ever was one, which Allen denies) after the fall of 1946, and based further upon the testimony of Keane and Grismer that no conspiracy could then exist, so far as defendant Grismer was concerned, and further, that the transaction was an exempt one made over a year after the original offering and not claimed to be treasury stock (493-496, 769-771).

At the close of plaintiff's testimony, defendant Allen made a motion to strike from the evidence all exhibits and all testimony relating to transactions occurring after December 26, 1946, on the grounds that the evidence of plaintiff, particularly that of Keane, established that no conspiracy existed between Keane and Allen or between Allen and Grismer after that date, and that plaintiff's evidence affirmatively showed defendant Grismer was at no time a party to or participant in the alleged conspiracy, as set forth in the indictment, and on that ground the evidence was incompetent, and for the further reason that it affirmatively appeared from the testimony adduced by the government itself that Grismer could not be and was not a party to any conspiracy whatsoever at the time of the inception of any conspiracy as alleged in the indictment against Allen, Keane and Grismer, and therefore could not conspire or be a party to the conspiracy, as alleged in the indictment, with Allen after December 26, 1946, which motion the court denied (71, 935, Spec. of Errors No. 4).

Specification of Errors No. 12 (i) raised this point in errors of court in submitting the case to the jury and in entering judgment against Allen and imposing sentence on him, as the evidence was wholly insufficient to support a verdict or judgment based thereon, on ground that there was no continuing conspiracy as alleged, all relations between Allen and Keane were terminated, according to Keane, by a quarrel between them in November, 1946, by the transfer in December, 1946, of the Lexington Silver-Lead bank account by

having its directors provide who could endorse checks and by the entry of Grismer and others into Keane's office and removal of Extension books therefrom, so that said alleged conspiracy, if any, exhausted itself in December, 1946, and was supplanted by an alleged new conspiracy starting in December, 1946; in other words, there were two separate, disconnected, distinct and independent conspiracies, if any at all. See also Specification of Errors Nos. 5, 6, 10, and 11.

After Keane severed all relations with Allen and Grismer, brought about by the fact that he would not make a disclosure demanded by Allen by audits of all companies interested in Montana Leasing since 1945, which included Independence and Delaware, can it be said that the acts of Allen and Grismer in ousting Keane from Extension and Pilot, in having audits made of their records, and upon discovery of Keane's defalcations and that the treasuries of these companies were empty, taking over these companies and trying to keep them going, were acts in furtherance of an alleged continuing conspiracy between Keane, Allen, and Grismer? We believe not.

That the result of a conspiracy is continuing does not make the conspiracy a continuing one. To make a continuing conspiracy, there must be a continuity of action to produce the unlawful result.

> *Fiswick v. United States* (1946), 329 U. S. 211, 67 S. Ct. 224, 91 L. ed. 196.

Continuous cooperation of the conspirators to keep it up is necessary.

United States v. Kissell (1910), 218 U. S. 607, 31 S. Ct. 124, 54 L. ed. 1178.

Then there is the question as to whether or not the state of facts adduced by the evidence created two separate conspiracies.

Judge Learned Hand, in the case of *United States v. Liss* (1943), 2d Cir., 137 F. 2d 995, at 998, in considering an indictment charging as a single conspiracy two separate conspiracies, which were separate both as to personnel and content, resulting in a variance between allegation and proof, said:

> "* * * and while that is not fatal of itself * * * it is not necessarily harmless. The question is like that of joining separate crimes in separate counts of a single indictment, or of consolidating separate indictments for trial; the propriety of either depends upon the danger they create that the jury may confuse the issues; * * * the fusing of the two conspiracies into one was therefore more serious against Liss and Conte—the only two of the accused who were confederates common to both conspiracies—than to Rudy or to the druggists. There was therefore a not wholly imaginary danger that the jury might use the evidence against them cumulatively to prove both charges."

The court concluded that if the conspiracies had been separated into two counts or two indictments it would have been proper to try Liss and Conte upon both charges at the same time.

In *Marino v. United States* (1937), 9th Cir. 91 F. 2d 691, it was held that where the proof shows two conspiracies to violate federal law, in each of which some of accused participated, but in both of which all

accused did not participate, one accused cannot complain if his substantial rights are not affected.

Under the facts in the case at bar, there were two independent, separate, disconnected, and distinct conspiracies, if any at all, and the failure of the court to recognize this condition of the proof and to rule on the evidence and instruct the jury accordingly affected the substantial rights of defendant Allen throughout the trial of this action, and on the motions made after the trial.

POINT III

Grismer had no knowledge of alleged agreement to divert funds of Extension and Pilot, as testified to by Keane, nor of diversion of funds by Keane, nor did he profit therefrom. Grismer was not a conspirator.

It is impossible to infer from the testimony adduced by the government as to Grismer's connection with the conspiracy count of the indictment that there was any criminal intent whatever on his part to defraud investors in the stock of Extension and Pilot. The joinder of Grismer as a defendant in the indictment was for the purpose of having the alleged conspiracy continue on with Allen from the time Keane withdrew in December, 1946, to the date of the indictment.

The court instructed the jury that if a person participates *knowingly* in a conspiracy for the purpose of aiding in the commission of a crime, he becomes a party thereto and is responsible just as though he was the one who originally conceived and planned the entire conspiracy (1214).

In Note 2 to the Krulewitch case, *supra,* the following observation of Judge Learned Hand was made in the case of

> *United States v. Falcone* (1940), 2d Cir. 109 F. 2d 579, 581;
>
> "* * * so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all-comprehensive indictments that they can be avoided."

The Court of Appeals for the Second Circuit reversed the judgment of conviction and its action was affirmed by the Supreme Court of the United States in *United States v. Falcone* (1940), 311 U. S. 205, 61 S. Ct. 204, 85 L. ed. 128, where in an opinion by Justice Stone it was held that the gist of the offense of criminal conspiracy, as defined by the federal statute, is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy; and persons having no knowledge of the conspiracy are not conspirators, citing with approval

> *United States v. Hirsch* (1879), 100 U. S. 33, 34, 25 L. ed. 539, 540;
>
> *Weniger v. United States* (1931), 9 Cir. 47 F. 2d 692, 693;

where in the Hirsch case, *supra,* the court said:

> "The combination of minds in an unlawful purpose is the foundation of the offense, and no party could be convicted on the overt act under this sec-

tion who had not joined in the previous conspiracy,"

and in the Weniger case, *supra*:

"The law requires proof of the common and unlawful design and the knowing participation therein of the persons charged as conspirators before a conviction is justified."

In *Burkhardt v. United States* (1926), 6th Cir. 13 F. 2d 841, it was said:

"But lack of vigilance, as we have seen, is not enough; there must also be proof of knowledge of the facts, coupled with an intention to aid in the unlawful act by refraining from doing that which he was in duty bound to do. These elements cannot be inferred from inaction alone."

"To constitute a conspiracy, the evidence must show an *intentional* participation in the attempt to commit the offense."

Lucadamo v. United States (1922), 2d Cir. 280 F. 653.

The proof must show more than suspicious circumstances.

Copeland v. United States (1937), 5th Cir. 90 F. 2d 78.

An accused does not violate the statute prohibiting conspiracies to violate federal law, if he does not join in agreement made, even if he commits an overt act.

Marino v. United States, supra.

Proof of unlawful agreement and of defendant's participation therein with knowledge of agreement is essential in prosecution for conspiracy, and mere evidence of participation in offense which is the object of the conspiracy is insufficient.

Langer v. United States (1935), 8th Cir. 76 F. 2d 817.

The evidence in fact must show something further than merely participating in the offense which is the object of the conspiracy, and such participation by Grismer is susceptible of a construction consistent with his innocence. The evidence was unconflicting as to Grismer, and was that of the government alone. Irrespective of Grismer's plea of *nolo contendere* to the conspiracy count, for the purposes of this trial the government established his innocence of the conspiracy count and conclusively showed that he was used as a cat's paw, not by Allen or Keane, but by the government, in order to gain a procedural advantage in this trial. As a consequence, there could be no conspiracy, if any, continuing after December 26, 1946, and the court erred in refusing to strike all exhibits and all evidence relating to transactions occurring after December 26, 1946.

Justice Jackson in the Krulewitch case, *supra,* says that the crime of conspiracy

> "* * * is always 'predominantly mental in composition' because it consists primarily of a meeting of minds and an intent."

The record established by the government as to Grismer is silent as to any meeting of minds between Keane, Allen and Grismer to commit any crime whatever, and there was no fraudulent intent on his part in connection with his acts and deeds in association with Keane or Allen in the organization and promotion of Exten-

sion and Pilot. Every act of Grismer showed a sincerity and honesty of purpose.

POINT IV

Certain instructions originally given were erroneous. Action of court in giving second set of instructions during deliberations of jury was reversible error.

The court told the jury in effect that the testimony of Keane and Grismer was not necessary to the government's case against Allen, providing the jury was convinced beyond all reasonable doubt of his guilt from the other testimony in the case (1229-1230), to which defendant excepted that there was no sufficient direct evidence to establish the elements of the conspiracy charged without the use of the testimony of Keane and Grismer and that to find the elements of that conspiracy by circumstantial evidence the jury should have been advised that such circumstantial evidence to establish that element must be consistent with one hypothesis or theory, guilt beyond a reasonable doubt, and cannot be consistent with innocence (Spec. of Errors No. 7(b), 1244).

Lawyer Keane, who furnished the government with the evidence and assisted in the preparation of this case, gave direct evidence of the scheme to defraud and the conspiracy as charged, admitting that he had diverted the funds of Pilot and Extension pursuant to an alleged agreement with Allen with whom he claimed to be in some kind of a partnership. All of the other testimony in the case was circumstantial, including the testimony of Grismer.

We are aware of the fact that a federal judge is vested with considerable discretion in commenting on the facts before the jury and in reviewing the evidence, provided he does so fairly and presents both sides of the case.

> *Boyett v. United States* (1931), 5th Cir. 48 F. 2d 482.

But by such an instruction the court was emphasizing and bolstering the circumstantial evidence far beyond its actual weight and importance and deprecating the importance and force of the direct testimony and thus invading the province of the jury in determining the weight and value to be given all of the evidence necessary to prove the government's case, greatly to the prejudice of the defendant Allen.

We are at a loss to understand why the trial judge was suggesting to the jury that Keane's evidence could be entirely eliminated and yet the jury could convict Allen on all the other testimony. The government thought enough of Keane's evidence, nothwithstanding it was interspersed with pleas of intoxication when his memory was being tested by defense counsel, by recalling him to the witness stand for rebuttal and dragging in his wife in an effort to corroborate her husband's testimony as to what occurred when Allen visited their home in the fall of 1946. It is also true that an important piece of testimony is missing in Keane's testimony. Why did not the government introduce Keane's bank account, his bank statements, and his cancelled checks?

Counsel for the government knew that Keane's testimony was the only nail upon which the jury could possibly hang a verdict of guilty in this case. Every act of Keane from the beginning of the investigation by the SEC of the affairs of Extension and Pilot leading up to the indictment of defendants in this case, his equity suit at Wallace against Allen, Grismer and others to secure an accounting and receivership, the proceedings on his offer to plead *nolo contendere* to the indictment before Judge Driver, his part in Allen's trial, and the proceedings on the sentencing of Keane and Grismer before Judge Driver, points to a three-fold purpose, to-wit: to escape being sent to the penitentiary at all costs, to avert disbarment by the Idaho State Bar, and to send Allen to the penitentiary. This goal was before him at all times. Was not the reward impliedly held out to Keane by the government for his testimony in this case of such transcendent importance to him that he would go the limit to testify for the government, regardless of the truth? Would such a ridiculous proposition have been made by Allen to Keane prior to the organization of the Extension in 1945 to which Keane testified that Allen and Keane divert the proceeds from the public offering of Extension stock in order to bail themselves out when in fact it was conclusively shown by the records themselves so far as Allen knew at that time that there was no necessity so to do? Keane's habitual intoxication, too, was a subterfuge and a snare to avoid the element of fraudulent intent in securing acceptance of his plea of *nolo contendere* and to be used by him on the witness stand to

ward off pressing cross-examination testing his memory by not being able to remember facts that might prove favorable to Allen's defense. Keane's close friendship for Allen (147) ceased in December, 1946, when Allen demanded that he make a complete disclosure, and the bitterness between them since that time was repeatedly shown by Keane on the witness stand.

Whenever what is called an accomplice or an informer turns what is called State's evidence, and whenever he is permitted by the court to be sworn as a witness in a case, there is then upon the part of the government an implied promise that if he tells the truth, he shall not be punished.

> *United States v. Ford* (1879), 9 Otto 594, 25 L. ed. 399, at 401.

No doubt Keane's testimony proved most satisfactory to the government on account of what later proved to be an extremely light sentence for his crimes. Keane understood perfectly that the more damaging evidence he gave against Allen, and the more embellishment he could give it the better were his chances to escape incarceration in the penitentiary and disbarment as an attorney. He knew perfectly well that the government would not complain of any falsehood he might swear to against Allen. There is but one excuse for using the testimony of a man who enters a plea of guilty (or *nolo contendere,* which has the same effect) and that is that without his testimony a conviction cannot, in all probability, be obtained. Whenever such a man

is put on the witness stand, that of itself amounts to a promise of immunity.

In *People v. Whipple* (1827) (New York-Cases in the Circuit Courts, and Oyer and Terminer), 19 New York Common Law Reports, no page number, 9 Cowen 708, @ 709, 710 and 711, the court said:

> "The evidence of accomplices has at all times been admitted, either from principle of public policy, or from judicial necessity, or from both. They are no doubt requisite as witnesses in particular cases; but it has been well observed that in a regular system of administrative justice, they are liable to great objections. 'The law,' says one of the ablest and most useful modern writers upon criminal jurisprudence, 'confesses its weakness by calling in the assistance of those by whom it has been broken. It offers a premium to treachery, and destroys the last virtue which clings to the degraded transgressor. On the other hand, it tends to prevent any extensive agreement among atrocious criminals, makes them perpetually suspicious of each other, and prevents the hopelessness of mercy from rendering them desperate.' "

In *United States v. Lee* (1846), 4 *MacLean* 103, 26 Federal Cases No. 15, 588, page 910, the court said:

> "An accomplice is used by the government because his evidence is necessary to a conviction."

Both the district attorney and his associate counsel for the government, Stocking, showed on the hearing of Keane's application to change his plea of not guilty to *nolo contendere* six months before the trial of Allen, that they had given careful consideration to the matters which Keane's evidence would cover if called as a witness for the government, including the docu-

mentary evidence which could only be admitted through his testimony, and it was then determined that his testimony was vital to establish a case against Allen or Grismer by proof beyond a reasonable doubt, if either should go to trial, as at that time the case was pending against them on pleas of not guilty (34-42).

So we have here the anomolous situation of government counsel in effect certifying to the trial judge that the testimony of Keane was necessary to the government's case in order to convict Allen and the court exercising his sound legal discretion in permitting Keane to testify under an implied promise of leniency if he testified fully and fairly, because his testimony was necessary to secure Allen's conviction, and then the court instructing the jury after the completion of the testimony that the testimony of neither Keane nor Grismer was necessary to the government's case against defendant Allen, provided the jury was convinced beyond all reasonable doubt of the guilt of defendant Allen from the other testimony (1229-1230), and defendant's counsel excepting to that instruction (1244) and no correction being made thereto by the court (1245-1249).

Keane understood as a lawyer from the beginning that, by turning over to the government the necessary documentary evidence, by assisting the government in the preparation of this case for trial, and by becoming a witness and testifying for the government, against his former friend Allen, he could expect to receive mitigation of punishment or other favorable treatment. If

Keane's testimony was not absolutely necessary to the government to secure a conviction of Allen and by means of which thirty-one government exhibits were admitted in evidence, then why in the name of Heaven did the government without regard to any sense of decency and propriety whatever, subject Keane, a fairly prominent lawyer, to the mental suffering, the chagrin and embarrassment which he suffered by publicly admitting under oath the crimes of embezzlement, mail fraud, violation of the national securities act and conspiracy to violate the laws of the United States, in violation of his oath upon admission to practice in the State of Idaho that he would support the Constitution and Laws of the United States and of the State of Idaho, and to the adverse newspaper reports that followed his testimony, with headlines such as "Keane Testifies of 'Heavy' Drinking," "Diet of Whiskey Told by Keane," and "Keane's Drinking Not Worse in '45 Than Now, Allen Says"?

Keane's testimony was absolutely necessary to convict Allen and none knew it better than government counsel. The court's instruction that the testimony of Keane and Grismer was not necessary to convict Allen was erroneous, of material prejudice to defendant Allen, and requires a reversal. If, for instance, the jury had been given the right to determine for themselves whether or not the evidence of Keane (or Grismer) was necessary to convict Allen, but because of his testimony that he gave claiming habitual use of intoxicating liquor to a degree that he only had moments of sanity thus affecting his credibility to such an extent that

none of his testimony could be believed and that if it therefore raised doubt in the jury's mind that the government had not proved its case beyond a reasonable doubt, Allen should be acquitted on all counts of the indictment, Allen undoubtedly would have received complete exoneration at the hands of the jury. Notwithstanding the instruction as given, Allen was acquitted of all substantive counts; if that instruction had been omitted, we firmly believe that twelve honest men and women would never have convicted Allen of the conspiracy count upon the evidence of a man like Keane.

The action of the court occurring while the jury was deliberating on its verdict and had been doing so for more than twenty-four hours materially prejudiced the defense of defendant Allen, was an abuse of the court's judicial discretion at a time where the most extreme care and caution were necessary in order that the legal rights of defendant should be preserved, and affected the substantial rights of defendant. The matter is fully stated in Specification of Errors No. 8. After giving lengthy and complex instructions to the jury at the close of all the testimony, to which defendant excepted, and after sixteen hours of deliberation by the jury and no agreement had been reached and after the court submitted to counsel a set of further instructions which he wished to give the jury, to which defendant's counsel strenuously objected, and after the court agreed not to give further instructions, unless the jury re-

quested additional instructions, the jury voluntarily returned into court after deliberating, as stated, for more than twenty-four hours and did not indicate confusion as to the law, nor the need for further instructions, but asked a simple question requiring a simple answer. Thereupon the court, assuming there were two problems troubling the jury, proceeded to and did give the jury a copious and complex set of instructions which served only to further perplex and confuse the jury, which were not of aid to the jury, and minimized the force and effect of the first set of instructions, to which defendant's counsel excepted.

In jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury, and they furnish ground for reversal, unless it affirmatively appears that they were harmless.

> *Fillippon v. Albion Vein Slate Co.* (1919), 250 U. S. 76, 39 S. Ct. 435, 63 L. ed. 853.

The court may recall a jury after they have been in deliberation for any length of time for the purpose of ascertaining what difficulties they have in the consideration of the case, and of making proper efforts to assist them in the solution of those difficulties.

> *Allis v. United States* (1894), 155 U. S. 117, 15 S. Ct. 36, 39, L. ed. 91.

In the case of *Burton v. United States* (1905), 196 U. S. 283, 49 L. ed. 482, where the jury, after long deliberations without an agreement, returned to report their inability to agree, and defendant's counsel

again urged the giving of defendant's requested instructions and the court's refusal was held reversible error. The court said:

> "Here was a case of very great doubt in the minds of some of the jury. It had deliberated for more than thirty-six hours, and been unable to agree upon a verdict. * * * Balanced as the case was in the minds of some of the jurors, doubts existing as to the defendant's guilt in the mind of at least one, it was a case where the most extreme care and caution were necessary in order that the legal rights of the defendant should be preserved. * * * A slight thing may have turned the balance against the accused under the circumstances shown by the record * * *."

The court in the case at bar had instructed the jury in the first instance that it was not necessary for the government to prove every allegation in the first paragraph of Count I but only one or more of the essential elements of the scheme to defraud or conspiracy as charged (1205). The jury did not ask for further instructions on this or any other point than an answer to a simple question, but the court assumed that this point was troubling them and gave the same charge again in the second set of instructions (1275).

This was a singling out and the giving of undue prominence to this particular issue, a repetition of one phase of the case, and such prominence given on that particular point was sufficient to prejudice the defendant by inducing the jury to believe that the issue presented was the controlling one.

> 5 C. J. S. "*Appeal and Error,*" Secs. 1768-1769, page 1136.

Further, the additional instructions were of such a nature as to add to the jury's doubt and confusion and to require reversal.

5 C. J. S. *"Appeal and Error,"* Secs. 1763(e), 1783(a).

The action of the trial court in the giving of additional, copious, complex, conflicting, contradictory, and misleading instructions, in addition to those already given which were copious, complex and misleading, and erroneous in some respects, after more than twenty-four hours of deliberation by the jury, was reversible error and affected seriously the substantial rights of defendant. After hearing the additional set of instructions at about 8 P. M. on Saturday night, the jury did not return a verdict until 10:35 A. M. Sunday morning (1277, 1282).

POINT V

Verdict of acquittal of Allen of all substantive counts of indictment and conviction of conspiracy count is not only inherently inconsistent and repugnant and lacks sufficient evidence to support it, but conspiracy count is improperly included in indictment.

Specification of Errors No. 10 relating to the error of the court in denying the motion of defendant Allen that the verdict of guilty returned by the jury against him on Count VII of the indictment, the conspiracy count, be arrested and that no judgment and sentence be imposed thereon and Specification of Errors No. 11 relating to the error of the court in denying a motion of defendant to have the court order a verdict of not guilty as to him on said Count VII or for a new trial as to said count will be discussed together (88,

91, 1285). These two motions are directed at the sufficiency of the evidence to prove a conspiracy against Allen or a criminal intent or either separate or joint and concerted criminal action on his part or to connect him in any manner with the crime set out in Count VII, and also against the verdict of the jury finding Allen guilty of Count VII, the conspiracy count, and the argument is based on what appears to be an interplay of legal principles arising from the fact that the verdict is not only inherently inconsistent and repugnant, but the state of the record in relation to the indictment lacks sufficient evidence upon which to sustain a conviction on the conspiracy count and the Supreme Court of the United States has indicated in decisive language and in no uncertain terms the legal principles and benefits of doubt that should be given to the position of defendant and the situation which obtains in this case. The situation presented by reason of Allen's acquittal on the six substantive counts and his conviction on the conspiracy count presents a weighty proposition for determination. This is so in view of the all-inclusive facts pleaded in all the counts, which are not conducive to an appropriate and intelligent separation of argument addressed to independent and exclusive propositions of inconsistency, lack of evidence, or improper inclusion of the conspiracy count. There are numerous cases treating of the problem of inconsistency alone; there also are cases which alone treat of the question of sufficiency or insufficiency of evidence to sustain conviction; and there are also cases which, excluding any consideration of the two propo-

sitions mentioned, bottom their argument upon the criticism of the conspiracy dilemma.

The court told the jury as to what were the essential elements of the scheme to defraud or conspiracy, as alleged in the first paragraph of Count I of the indictment and realleged by reference in every other of the six remaining counts (1234-1235, 1237), so, eliminating for the sake of brevity the non-essential elements of the crimes charged to defendants, the indictment alleged in every count in substance that defendants Allen, Keane, and Grismer knowingly, wilfully, and intentionally devised, joined, or participated in a scheme to defraud purchasers or prospective purchasers of stock of Extension and Pilot and to obtain money and property by means of false and fraudulent pretenses, representations, and promises for the purpose of doing these essential elements of the scheme to defraud:

1. By concealing the fact that Allen was a promoter of said companies and was to receive any part of the stock to be taken by defendants;

2. By representing to investors in stock of said companies that the proceeds from the sale of said stock would be used by said companies for the exploration and development of their mining properties in Shoshone County, Idaho, well knowing that such proceeds were not to be so used and that a portion of the moneys due said corporations from the sale of their treasury stock would be appropriated and diverted from said companies to their own use and benefit and that it was so appropriated and diverted;

3. By intending and agreeing that certain stock in said companies would be given to attorneys as attorney's fees, but that actually a part of it would and did come back to the defendants as promoters for the purpose of defrauding the public (2, 1234-1235, 1237).

The first three counts of mail fraud alleged in effect that defendants, for the purpose of executing said scheme, did knowingly cause to be delivered by United States mail, a certain letter (5).

Likewise, as to Counts IV, V, and VI, it was alleged that defendants caused to be delivered by United States mail certain letters, all of which acts were against the peace and dignity of the United States and contrary to the form of the statute (7-10).

In Count VII it was alleged in substance that defendants conspired, combined, confederated and agreed with each other and with divers other persons unknown to the grand jury to commit the following crimes and offenses against the United States: violations of mail fraud statute and two sections of the National Securities Act, by using the United States mails and means and instruments of transportation and communication in interstate commerce, for the purpose of executing the device, scheme and artifice to defraud described in paragraph 1 of the first count of the indictment, which paragraph is here and now realleged.

That the government intended and contended that the same scheme was jointly intended and executed by all of the defendants, including Allen, is indicated by the statement of the district attorney to the court, when

the jury asked their question hereinbefore referred to, that the court should instruct the jury that the scheme is set forth in Count I in detail and defines what that scheme is again in as short and concise language as possible and then state that the *other counts incorporate that same scheme by reference* and that the various other respective counts *charge that the same scheme was used as Count I,* to mail letters on the other dates mentioned in the *other respective counts* (1266).

What has been the result of the verdict of the jury in view of the above? The jury has held by its verdict on the substantive offenses charged, that the defendant Allen did not singly, or jointly and in concert with the other two defendants, commit any of the crimes charged in Counts I, II, III, IV, V, and VI. Likewise, the verdict of the jury has the effect, as to Counts I to VI, inclusive, of holding that Allen was not singly, or jointly and in concert with the other two defendants, guilty of committing any of the so-called false and fraudulent pretenses, representations and promises, or of participating in such *scheme,* and it is pertinent to observe that in pleading the false and fraudulent pretenses, representations and promises the government pleaded the entire evidence structure of its case as to each and every count in the indictment including Count VII. It seems absolutely clear that the lengthy and detailed pleading of the acts alleged to have been committed, in view of the government's theory, was intended by the government to encompass all of the direct and circumstantial proof upon which the govern-

ment relied to prove each count in the indictment herein. Likewise, it is most pertinent to note that the indictment alleges as to the alleged commission of crimes that "prior to June 1, 1945, and continuing to the date of this indictment," etc. In other words, the government supports Count VII upon precisely the same alleged evidence, the same circumstances, the same allegations, covering the same time that it bases its allegations of *joint scheming and defrauding, etc.,* which it sets up in the substantive counts of the indictment. A careful examination of the specific acts of false and fraudulent pretenses alleged to have been committed in Counts I to VI is the clearest and most absolute proof that no fact, or circumstance set out in Count VII is excluded from the all-inclusive and detailed charges of joint and concerted action alleged in Counts I to VI. An examination of Count VII indicates its absolute dependence and complete reliance on the same specific allegations and evidence as was employed to support those counts numbered I to VI.

In view of the language used in all the counts in the indictment, and, furthermore, in view of the theory of the government as indicated by its contention respecting what it contends are necessary elements of evidence, it seems unquestioned that the government was and is of the opinion that the essential elements of each count were those which were pleaded in Count I and throughout Counts II to VI and which were specifically included by reference in Count VII. The elements of the offenses so far as the evidence, the alle-

gations pleaded, and the theory of the government was concerned, were identical as to each count. We are therefore convinced that the lengthy and detailed specific allegations in the indictment which sought to prove the defendant Allen guilty of the specific crimes charged in each count were the self-same necessary elements as to each count.

The jury found that the essential elements upon which the government depended, and for which it contended, and which it pleaded in Counts I to VI were not proved; and any contrary finding in Count VII concerning the self-same necessary elements of proof and covering the self-same time involved is not only inconsistent but necessarily repugnant. Such a conviction if allowed to stand in view of the present mind of the Supreme Court of the United States would seem abhorrent to the right of the defendant to receive a fair trial, and fair treatment consistent with the principles of our system of justice. As Justice Jackson, in the Krulewitch case *supra,* said:

> "This case illustrates a present drift in the federal law of conspiracy which warrants some further comment because it is characteristic of the long evolution of that elastic, sprawling and pervasive offense. Its history exemplifies the 'tendency of a principle to expand itself to the limit of its logic.' The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice."

A determination of the issues here must depend upon the interplay of principles of law which arise from a combination here of inconsistency in the verdict, lack of legal and proper evidence, and the relation of those omissions to the approach to the conspiracy statute indicated in the above quotation and opinion.

In order to ascertain properly the full sweep of our contention we shall first discuss the question of inconsistency in the verdict without contending that such inconsistency, in all circumstances and in all particulars and standing alone, would be sufficient under the federal decisions to warrant the court in granting the motion for acquittal as to Count VII. For some time there was decided conflict in the Federal Courts with reference to the validity of an inconsistent verdict.

Prior to the decision in 1932 of the Supreme Court of the United States in

> *Dunn v. United States,* 284 U. S. 390, 52 S. Ct. 189, 76 L. ed. 356, 80 A. L. R. 171, on *certiorari* from the 9th Cir. 50 F. 2d 779,

the Court of Appeals for the 3d, 8th and 9th Circuits had held that a conviction would not stand which was inconsistent, and unless the verdict of guilty was supported by substantial evidence other than that evidence which was offered in support of the counts on which the acquittal had been had.

Justice Butler, in his dissent in the Dunn case, *supra,* considered in a very scholarly opinion the matter of inconsistent verdicts and his reconciliation of the prob-

lem, and stated that in criminal cases no form of verdict will be good which creates a repugnancy or absurdity in the conviction, citing

> 2 *Bishop,* New Criminal Procedure, 2d Ed. Sec. 1015a(5)

and concluded as follows:

> "I am of opinion that the authorities established as well-settled: (1) that when, upon an indictment charging the same offense in different counts, the jury acquits as to one and convicts on the other defendant is entitled to new trial; and (2) that, when different crimes are charged in separate counts and the jury acquits as to one and convicts on the other, the conviction will be sustained unless, excluding the facts which the jury in reaching its verdict of acquittal necessarily found not proved, it must be held as a matter of law that there is not sufficient evidence to warrant the verdict of guilty; and, where the evidence outside the facts so conclusively negatived by the acquittal on one count is not sufficient to sustain guilt on the other count, defendant is entitled to a new trial."

The statement of Justice Butler would indicate that the present verdict on Count VII would certainly be inconsistent in itself because of the allegations pleaded in Count VII and found not proved in Counts I to VI and in any event the verdict would certainly lack sufficient evidence upon which to sustain the conviction.

To hold as consistent and not repugnant a verdict of acquittal on all substantive counts of indictment as against conviction on conspiracy count on the same and identical evidence on which defendant was acquitted where the elements of the alleged scheme to

defraud were the same as the elements of the alleged conspiracy is neither common sense nor rational. Such a verdict and judgment of conviction and commitment of Allen thereon was in violation of the Fifth Amendment to the Constitution of the United States and deprived him of a fair trial and the fair treatment to which he was entitled under our American system of justice.

POINT VI

Conspiracy conviction of Allen should not be upheld where prosecution for substantive offenses was adequate and purposes served by adding conspiracy charge was to get procedural advantages over defendant to ease way to his conviction.

We have heretofore pointed out under Point I of Argument the statement of Justice Jackson in the Krulewitch case, *supra,* that statutes authorize prosecution for substantive crimes without the dangers to the liberty of the individual and the integrity of the judicial process that are inherent in conspiracy charges; that there should be no straining to uphold any conspiracy conviction where prosecution for the substantive offenses is adequate; and that the purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction.

Justice Jackson cites in footnote 2 from the Conference of Senior Circuit Judges presided over by Chief Justice Taft in 1925 as follows:

> "* * * the rules of evidence in conspiracy cases make them most difficult to try without prejudice to an innocent defendant."

Justice Jackson observes that the basic conspiracy principle has some place in modern criminal law, because, to unite back of a criminal purpose, the strength, opportunities and resources of many is obviously more dangerous and more difficult to police than the efforts of a lone wrongdoer, and

> "It also may be trivialized, as here, where the conspiracy consists of the concert of a loathsome panderer and a prostitute to go from New York to Florida to ply their trade * * * and it would appear that a simple Mann Act prosecution would vindicate the majesty of federal law."

In the case at bar an administrative branch of the government commonly called the SEC was prosecuting in the name of the United States only three defendants on the theory that they had joined in a scheme to defraud in violation of the mail fraud statute and the National Securities Act and had, in addition, conspired to violate those statutes—a case of covering over charges of the commission of specific crimes with an "elastic, sprawling, and pervasive offense" of conspiracy to commit the specific crimes, which required an extremely low minimum of proof to establish, permitted the loose application of rules of evidence and creating an especially difficult situation for the defendant.

The Court has itself considered this problem in *Von Moltke v. Gillies* (1948), 332 U. S. 708, 68 S. Ct. 316, 92 L. ed. 309. The separate opinion of Mr. Justice Frankfurter, concurred in by Mr. Justice Jackson, contains this striking comment on criminal conspiracy:

"But it would be very rare, indeed, even for an extremely intelligent layman to have the understanding necessary to decide what course was best calculated to serve her interests when charged with participation in a conspiracy. The too easy abuses to which a charge of conspiracy may be put have occasioned weighty animadversion by the Conference of Senior Circuit Judges. * * * The subtleties of refined distinctions to which a charge of conspiracy may give rise are reflected in this Court's decisions. See e.g., *Kootcakos v. United States,* 328 U. S. 750, 66 S. Ct. 1239, 90 L. ed. 1557. Because of its complexity, the law of criminal conspiracy, as it has unfolded, is more difficult of comprehension by the laity than that which defines other types of crimes. Thus, as may have been true of petitioner, an accused might be found in the net of a conspiracy by reason of the relation of her acts to acts of others, the significance of which she may not have appreciated and which may result from the application of criteria more delicate than those which determine guilt as to the usual substantive offenses."

Likewise, Justice Jackson in the Krulewitch case, referred to an article in 62 Harvard Law Review, December, 1948, page 276, which is likewise of great interest in its discussion of conspiracy. It is entitled, *"The Conspiracy Dilemma Prosecution of Group Crime or Protection of Individual Defendants."* The article itself is a noteworthy discussion of the conspiracy weapon: it quotes the use of the conspiracy statute, and refers to its description by Judge Learned Hand in *Harrison v. United States* (1925) 2d. Cir., 7 F. 2d 259, 263, as the *"darling of the modern prosecutor's nursery."*

The Krulewitch case, *supra,* to which reference has

been made, contains in a concurring opinion of Justices Jackson, Frankfurter and Murphy a very able discussion of the law of conspiracy as it relates to the matters now before this court. It is truly a situation described by Justice Jackson when he said:

> "A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. If he is silent, he is taken to admit it and if, as often happens, co-defendants can be prodded into accusing or contradicting each other, they convict each other. There are many practical difficulties in defending against a charge of conspiracy which I will not enumerate."

Likewise, it should be remembered that, "*a conspiracy is not an omnibus charge, under which you can prove anything and everything, and convict of the sins of a lifetime.*"

> *Terry v. United States* (1925), 9th Cir., 7 F. 2d 28, 30.

The logical elimination of facts not proved combined with the "scatter gun" conspiracy charge, would have resulted in a complete verdict of acquittal. We submit that the statement of Justice Jackson should be kept in mind in a consideration of the many problems involved in this case, and that this court should not strain, in view of the record and the acquittal by this jury of the defendant Allen on six counts, to uphold the conspiracy conviction on the conspiracy count in issue here.

CONCLUSION

Because of the rulings of the court which we believe to be erroneous and the verdict of the jury convicting Allen of conspiracy and acquitting him of the substantive counts and for the reasons stated, reversible error affecting the substantial rights of defendant Allen has occurred, and we, therefore, submit that the judgment of conviction and commitment of defendant and appellant Allen should be reversed.

Respectfully submitted,

R. MAX ETTER,
WILLIAM E. CULLEN,
THERRETT TOWLES,
J. F. EMIGH,
JAMES A. MURRAY, JR.,
Attorneys for Defendant and Appellant,

JAMES ANTHONY ALLEN.

APPENDIX

Mail Fraud Statute

The pertinent portion of Title 18 U. S. C. A., Section 338, is as follows:

Sec. 338 (Criminal Code, section 215.) Using Mails to Promote Frauds; * * * Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

National Securities Act

Title 15 U. S. C. A., Section 77e, is as follows:

Sec. 77e. Prohibitions Relating to Interstate Commerce and the Mails.

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) It shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security registered under this subchapter, unless such prospectus meets the requirements of section 77j; or

(2) to carry or to cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of section 77j.

Title 15 U. S. C. A., Section 77q, is as follows:

Sec. 77q. Fraudulent Interstate Transactions.

(a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

(c) The exemptions provided in section 77c shall not apply to the provisions of this section.

Conspiracy Statute

Title 18 U. S. C. A., Section 88, is as follows:

Sec. 88. (Criminal Code, section 37.) Conspiring to Commit Offense Against United States. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Impromptu Statement Made By Defendant Grismer at Stockholders' Meeting of Pilot on August 7, 1948

Q. * * * Do you recall a stockholders' meeting of the Pilot Silver Lead held on August 7, 1948, in the assembly room of the Old National Bank Building, at 7:30 P. M.?

A. Yes.

Q. Do you remember being there?

A. Yes, golly yes.

Q. I want to read a statement that you made there and ask you if you made that. "Mr. Grismer: I don't believe I need any introduction to the Pilot because I was the original locator of the Pilot Mine, together with Bill Walker, in 1924. We packed up there the picks and drills and made the property what it is today. We of course were common guys and a long way

from knowing exactly how to handle things, but we finally ended up in incorporating the Pilot, and you might say promoting it. Very well. A good many people here bought stock on my reputation. I had a good mining reputation at that time. I haven't got quite as good now. Anyway, we turned this over to that Board of Directors, the first Board, with the full intention and hopes that they would—well, figuring they would play fair with everyone. I went on as manager of the property. I am a little ahead of the game. Mr. Bentley cites figures that are supposed to be since October, 1945, to June, 1947. It took so long to get a certain amount of money. The company was not incorporated until January, 1946, and in June, 1946, the company was fully financed. Not a dollar has come in since. A lot of it went out. In August I started operation as manager of the property at a rate supposed to be at $200.00 a month. September came around. I was not paid. I didn't care a heck of a lot. I thought I would let things run as long as we were going to make a mine out of it, and I found that a lot of bills were not paid. I then tried to enter the office of F. C. Keane, who was president and the whole cheese, you might say, of the Pilot." Did you say that?

A. That was after the incorporation.

Q. "He and his secretary, Glynn D. Evans, were the officers and directors of the Pilot. I couldn't contact Mr. Keane. He was always in the habit of running away when I came near and cutting me off: 'Well, I will take care of it tomorrow,' and he called me pretty

fancy names now and then, which was quite characteristic of him, and I told him that these bills had to be paid. 'Well, how in hell do I know they are legitimate bills?' That is some more petty-fogging, I guess. I told him, 'Any time I send a bill, it is a legitimate bill. I wouldn't send it if it wasn't.' I said, 'If those bills are not paid next month, I will take action.' November came around and I was not paid as manager, and I am not paid to this day. December 10th came around and the bills were still not paid. I couldn't do anything with Pilot. I was not an officer. I was not a director of the Pilot. But prior to that, in the office of F. C. Keane, the only one I could contact was Mrs. Vermillion, and I was just trying my hardest to get things moving, and in the course of our conversation she once said, 'The bank deposits are in terrible shape.' That was enough for me to take action. As I said a minute ago, I couldn't take any action on the Pilot, but I was President of the Lucky Friday Extension, which was also in the hands of F. C. Keane.''

A. That's right.

Q. ''Well, people say, 'Why in heck did you trust him?' I will tell you why. He was attorney for the Independence; he was president of the Independence Lead; he was attorney for the Clayton. They trusted him; why in hell shouldn't I? That is my answer, and I say, unfortunately. On December 12, after seeing that the bills were not paid on the Pilot, I thought there was something radically wrong. I called a meeting of the Board of Directors of the Lucky Friday

Extension, and that meeting was called at five o'clock because one of the members of the Board was working and was working overtime. At that meeting I told the Board the situation of things in the Pilot, and I told them that I just couldn't come to any agreement. I said, 'I can't get any statements, can't get nothing from Keane, as to the Lucky Friday or the Pilot,' and I said, 'I personally think there is something radically wrong and I will entertain a motion that F. C. Keane be discharged from the service of the Lucky Friday Extension as attorney for the Company and that his name be stricken from the bank,' and that motion was made and carried." Do you remember saying that?

A. Yes, certainly.

Q. "Then the next motion was made and carried that the office be moved from its present location, which was in Mr. Keane's office, and I designated my own office as the office of the Lucky Friday Extension. That was carried. Then we were to move the books over immediately. Well, we went in and the then secretary, Glynn Evans, he showed us where some of the books were. All we got then was a stock ledger and a stockholders' list and the seal. The rest was in the safe. We would not enter the safe, and that is all we moved over that night, but we had enough. We were in business, anyway. I put them in my office under lock and key. That night my good friend called me and called me a nice pet name. He said, 'You so and so, you burglarized my office,' and he said, 'You better have that stuff back by nine o'clock in the morning or

I am going to have you arrested.' I told him, 'Well, I don't like that name connected with me, nor do I like the name burglars.' 'But,' I said, 'rest assured, Big Shot, there will be nothing back, and I will be there at eight o'clock waiting for you to arrest me.' '' That's Keane you're talking about?

A. Yes, sir.

Q. '' 'Go to it.' But he wasn't there, and I never was arrested, not to this day, anyhow. Well, we started business. That is all we ever got out of that office, was the stock record and the stock register and the seal. To this day we haven't got a cancelled check of any kind there. He finally did send over a copy of the by-laws, a few little things like that that didn't matter any. Then I shut down the Pilot when I saw how things were and I could get no action, and I proposed, and my lawyer will testify, 'If you get one lawyer to sue another you are a genius.' Anyhow, I couldn't get to his office until about the first of February. I figured he would be at his office. I called the SEC and they got after him, and after a little course of time I believe Denney got the condition of things, and he said there was about thirty-seven dollars or something in the bank.

''To this day we have no records of the company pertaining to the affairs of this company up to January 1, 1947, at the time all of this money disappeared. Not only did the Pilot money disappear but the Lucky Friday money disappeared. So I hired Mr. Wayne, who unfortunately now is dead, as my attorney to try and

get this thing going and get the records and so on, and he always threatened to start suit or one thing or another. And finally, we decided to run a bluff on him. That is when I called Mr. Allen in to help, because he knew Keane better than I did and perhaps could do something. I told him the situation. I said, 'Can you do something?' He said, 'I will go ahead and try.' He got interested and kept trying one way or another, which finally ended up—between Mr. Wayne and Mr. Allen they got the idea they were going to call a stockholders' meeting, and they threatened Keane with that, that either he resign and appoint a new board or his whole board would be removed, and that we would call a meeting and expose him and we would appoint a new board anyway, and that is what induced Keane to resign. But, as I say, we never got any records of any kind of the twenty-five dollars in the kitty.

"Sure, I say, there were creditors coming in. They were trying to foreclose on those different things, and that is how Mr. Wayne kept them off. He kept them quite a period of time, until such a time as this trusteeship was worked out. I gave pretty near all of my stock that I got for payment of my company into that trustee account to make these companies whole, for the simple reason, hadn't I done it I would have lost and all of my friends would have lost. As I see it, my friends have a chance to save their stock, because a receiver would have been appointed. Otherwise, everything would have been lost. But between my friends and Mr. Allen, we saved this stock by putting this stock in the hands of trustees to make this company

whole, and in the meantime start work to get some new action on there, and finally got associated with Lead and Zinc Syndicate Company, and my thanks for my efforts, after owning that property and making it what it is, owning it for twenty-eight years and giving up my stock, is a good swift kick, a letter sent out to the public telling what a low down so and so am I, and the public will fall for it, and that is the reason for mostly all of this business here tonight. Our efforts, as I said, after giving up all of these properties—what do we get out of it? That is why Mr. Allen is here. I asked him in. I hope that answers the question." Did you make that speech at a stockholders' meeting?

A. Pretty much that way.

* * * * * *

Q. Likewise at the stockholders' meeting, Mr. Grismer, do you recall making the following further statement: "I can tell you that during my ownership, including Mr. Walker back there, there was about $40,000 spent on it. There was in the neighborhood of 2,200 feet of work on it. A great deal of that was done by myself by hand work, and if you know what a mine is you know what hand work is. You know that is not child's play. I spent thousands of dollars of my own money to bring the property to what it is, and ninety per cent of the stockholders here now have more stock than I have, and as to what became of the money, to this day we haven't been able to get any records as to what happened to anything. F. C. Keane kept them there and it is now under subpoena of the SEC and

we can't get it. We have made repeated efforts, asked the SEC to turn those over to different parties. We always get a run-around, and no one has ever been able to find the exact amount of money that went any particular place, but it went out without the knowledge or consent of any of the Board of Directors." You made that statement?

A. That's right.

Q. And this one too, answering a question: "Mr. Grismer: Yes. Have you the report on the Pilot? I prepared charges against F. C. Keane and that time I knew—I could see that it was going to be a whitewash, and Mr. Bentley will testify to the fact, I got about two hours' notice to appear. I got a subpoena, and I came off the job and appeared at one o'clock at the courthouse for the hearing—no, not the hearing; it was merely regarding the plea. I called up the prosecutor, I said, 'Now, just what is the nature of this thing?' 'Oh,' he said, 'we will just gather and set the bond,' and I said, 'That is all there is to it? There will be no hearing?' 'Oh, no, no. There will be no hearing. Of course, he can demand a hearing.' I knew darn well by the tenor of his conversation that already the case had been settled. I got on the phone and called Mr. Bentley and asked him to come down and asked him to witness the whitewash of F. C. Keane. Isn't that the words I told you?" Did you make that statement?

A. That is right.

Q. And this, further: "You asked the question

awhile ago—I based this complaint, due to the fact that I couldn't get any books or anything. We did succeed in having a certified public accountant by the name of Mr. Randall, with the permission of the SEC, to go and make an audit of some of the records that the SEC had, and I based my complaint on the findings of the auditor, of a certified public accountant, who had access to the books and records that were denied me, and it was on that basis that I entered this complaint, and that is certain. When I got on the stand I told him that I based my complaint on this audit on the findings of a certified public accountant when the books and records were denied me. But our great prosecuting attorney down there didn't see fit to dignify the oath of a certified public accountant and bring them into his office because it would have convicted Keane, and that is the Probate Court of Shoshone County." Did you say that?

A. I did.

Q. In that conversation when you were referring to "we," you were referring in part to Mr. Allen?

A. In which?

Q. When "we went down and got the records" and "we got after him"?

A. Yes, Mr. Allen was very much interested in that and active in that, yes. (451-460.)

FIRST SET OF INSTRUCTIONS

Court's Instructions to Jury at Close of All the Testimony.

The Court: Members of the jury, you've heard the

evidence in this case and the argument of counsel on both sides. You've now reached that state in the trial where it's my duty to instruct you as to the law, and it's your duty to listen carefully to the instructions that I give you.

In Federal Court the instructions are what are known as oral, that is, they're oral to you. You will receive no copy of what I say. They're oral to counsel; they likewise only know actually what the instructions are when they hear them spoken. They may be oral or written as far as I'm concerned. Frequently the instructions I give are entirely oral. While I think the language is not so excellent, I've sometimes thought that people understand better what's spoken than what is read. In some cases I give the instructions entirely from writing. In other cases, as you will find in this case, I combine some speaking, as I am now doing, and some writing, as I will later do, but again to you they are oral. You can only take to the jury room your recollection of the instructions as you hear them. The instructions are vital. They are intended to and must guide you in your consideration of the evidence. They're to give you the law applicable in this case.

This is an important case. All cases are important to the parties involved. This case is important to the government. It is important to the defendant. It is important to the public. It is important to you as jurors, because you're interested under your oaths and by virtue of your duty as jurors of returning the correct verdict in each instance on the merits under

the law and the evidence, free from sympathy for anyone, and free from prejudice against anyone. After I've instructed you, you will upon direction retire to the jury room to consider of your verdicts as to the seven counts with respect to the defendant James Anthony Allen.

The grand jury has returned an indictment against the defendants James Anthony Allen, Francis Clayton Keane, and Joseph Valentine Grismer. The defendant, Francis Clayton Keane, has pleaded *nolo contendere* to each of the seven counts. The defendant, Joseph Valentine Grismer, has pleaded *nolo contendere to* Count VII, the conspiracy count, and the first six counts were dismissed as to him. The disposition of the case as to those two defendants will be determined by the Federal Judge before whom they appear for sentence. It is expected that that Federal Judge will be Judge Driver, he having been the judge before whom those two pleaded *nolo contendere.* The defendant James Anthony Allen having pleaded not guilty to the indictment and each of the seven counts, is now on trial before you and you are now concerned in this case as to the guilt or innocence of the defendant, James Anthony Allen.

Inasmuch as the defendant Allen, who is now on trial before you, entered a plea of not guilty to the indictment and each count thereof, that means that he denies every material allegation in the indictment, which places upon the government the burden of proving beyond a reasonable doubt every essential, material allegation as to each of the seven counts.

It is your duty and I am confident that you will do your duty as jurors under the oath you've taken to conscientiously and seriously return a true verdict as to each of the sevent counts under the evidence and these instructions. You can readily understand that the government can only be maintained by the impartial enforcement of the law. You as jurors are not concerned with whether or not the laws here involved ought to have been enacted, nor are you concerned with any penalty or punishment which may be imposed under the statutes in this case in the event a verdict of guilty under one or more of the seven counts is returned against the defendant Allen. You are simply concerned with returning the correct verdict of guilty or not guilty as to each of the seven counts. In the event there is a verdict of guilty the responsibility will be mine, and in the event the sentence I should impose would be too heavy, it would be my error and not yours. In the event I should be too lenient, the mistake would be mine, the fault mine, and in no wise yours. It is not the policy of the law that a verdict of guilty should be returned against anyone on trial unless such verdict is supported by the evidence beyond a reasonable doubt, but it likewise is against public policy that any guilty person should escape conviction if the evidence establishes beyond all reasonable doubt that he is guilty as charged.

It is my duty to instruct you as to the law governing this case, and it is your duty to take the law from me and accept that to be the law as stated to you by me, notwithstanding any statement or contention of

any attorney as to what the law is or ought to be, and despite any opinion of your own that the law is different or ought to be different than I state it to you to be. The mere fact that you may not have favor for any particular law, or laws, cannot rightfully be by you permitted to influence you at all in arriving at a verdict as to any of the seven counts here involved.

You are instructed that the law in an American court presumes every defendant in every trial and as to every type of charge to be innocent until he is proven guilty by the evidence beyond a reasonable doubt. This presumption is not a mere matter of form, but is a substantial right of every defendant in every case, as well as a substantial part of the law of the land, and it continues throughout the entire trial and until the jury finds that this presumption has been overcome by the evidence beyond a reasonable doubt. If after the jury has considered all the evidence produced, it then is convinced beyond all reasonable doubt that the defendant is guilty as charged, then the presumption of innocence is overcome by the proof of guilt, and such presumption of innocence disappears from the case, and it becomes the duty of an honest jury to return a verdict of guilty.

The indictment filed in this cause is merely the method provided by law whereby the United States, through a grand jury, and on behalf of the people, shall accuse or charge one or more persons of violation of the criminal laws of the United States, and whereby the one or ones accused shall be informed of

the accusations against him or them that he or they may defend against such. The fact that an indictment has been found and returned by the grand jury gives rise to no inference whatsoever that the defendant Allen is guilty of any offense mentioned in these instructions or mentioned in the indictment. The guilt of any defendant who pleads not guilty can only be established by proof at the trial of his guilt beyond all reasonable doubt, and such proof must be by the evidence; the indictment is not the slightest evidence at all.

The instructions which I am giving you are merely the method provided by law whereby the Court shall advise you of the law applicable to this case. These instructions must guide you in the consideration of the evidence and in the determination of what your verdicts as to each of the seven counts shall be. These instructions are to be by you understood, interpreted, and applied as a connected body and as an entirety. You will disregard any statement made by counsel on either side of this case as to what any testimony has been unless borne out by your final recollection thereof. You are, likewise, to disregard any testimony which may have been stricken by the Court, and you must, likewise, disregard any question or answer thereto to which the court sustained an objection.

You've been told that the evidence must establish the guilt of a defendant in an American court as to every charge beyond all reasonable doubt. Therefore it is important that I advise you as to what is meant

by proof beyond all reasonable doubt. Proof beyond all reasonable doubt does not necessarily mean that the evidence shall establish the guilt of the defendant beyond all possible doubt. The law does not require absolute certainty of guilt before there can be a verdict of guilty at the hands of a jury. While the law does not require proof of guilty to an absolute certainty, or beyond all possible doubt, the law does require proof of the guilt of the defendant beyond all reasonable doubt before there can be a conviction. The expression "reasonable doubt" means in law just what the words imply—a doubt founded upon some good reason. A reasonable doubt must arise from the evidence, or lack of evidence. Neither sympathy nor the desire of a jury to avoid performing a disagreeable duty constitutes a reasonable doubt. Neither a mere whim nor a vague, conjectural doubt founded upon mere possibilities, but not founded on reason, constitutes a reasonable doubt. A reasonable doubt is such a doubt as a sensible, honest-minded man or woman would reasonably entertain in an honest and impartial investigation to ascertain the truth about a matter as important and serious as are the matters involved in this trial.

In order to warrant conviction as to the seven counts, or any of them, the evidence need not be so strong as to exclude all doubt or possibility of error, but in order to warrant conviction as to any count, the evidence as to such count must be strong enough to exclude all reasonable doubt, that is, strong enough to exclude all doubt based on reason. If, after considering all the

evidence in this case, you can say that such leaves in your mind a firm, conscientious and abiding conviction of the guilt of the defendant James Anthony Allen as to any count or counts, then you are convinced beyond a reasonable doubt of the guilt of said defendant as to said count or counts, and then it would be your duty to find said defendant James Anthony Allen guilty as to such count or counts. On the other hand, if after considering all the evidence in the case you do not have a firm, conscientious and abiding conviction of the guilt of the defendant James Anthony Allen as to any count or counts, then you have a reasonable doubt as to such count or counts and then it would be your duty to find said defendant not guilty as to such count or counts. Proof beyond all reasonable doubt has frequently been defined as "proof to a moral certainty," but, while the proof must be strong enough to constitute a moral certainty of the guilt of the defendant on trial, it need not be strong enough to constitute an absolute certainty.

The indictment in this case is brought under three different statutes, namely, the so-called mail fraud law, the National Securities Act, and the conspiracy statute. The first three counts charge violation of the mail fraud law, Section 338, Title 18, United States Code, which, as far as now material, reads as follows:

"Whoever, having devised, or intended to devise, any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * * shall,

for the purpose of executing such scheme or artifice, or attempting so to do, place, or cause to be placed any letter, postal card, package, writing, circular, pamphlet, or advertisement * * * in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter to be sent or delivered by the post office establishment of the United States, or shall knowingly take or receive any such therefrom * * * or shall knowingly cause to be delivered by mail according to the directions thereon * * *'' shall be punished as therein provided.

The next three counts, counts 4, 5 and 6 of the indictment, charge a violation of Section 17-A of the Securities Act of 1933 as amended, being Title 15, United States code, Section 77-q. This section reads as follows:

"It shall be unlawful for any person, in the sale of any securities, by the use of any means or instruments of transportation or communication in interstate commerce, or by the use of the mails, directly or indirectly * * * to employ any device, scheme or artifice to defraud."

In the seventh count of the indictment it is charged that there was a conspiracy by the defendants Allen, Keane and Grismer and other persons to the grand jurors unknown, to commit violations of both the mail fraud law and of the securities act, including the violations charged in the first six counts, as well as other violations not necessarily charged in the first six

counts. The conspiracy statute as far as this case is concerned reads as follows:

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy" is guilty of conspiracy.

With respect to counts 1, 2 and 3 of the indictment charging violation of the mail fraud law, you will note that the offense as described by the statute I just read a little while ago to you consists of two parts, first, a scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, and secondly, some particular act of using the United States Mails for the purpose of furthering or executing such scheme or artifice.

Count 1 charges that the defendant Grismer along with defendants Keane and Allen employed the scheme to defraud, and charged that for the purpose of executing this scheme and attempting so to do, the defendants on or about September 20, 1945, caused a letter to E. J. Gibson and Company, 5 Wall Street, Spokane, Washington, to be sent by the post office establishment of the United States.

Fraud alone against the public is not punishable under Federal law. It is only when the mails are used in some way in connection therewith that the Federal government can prosecute. After a fraudulent scheme

has once been put into operation each letter or other article of mail matter placed in the mails or received through the mails in furtherance of such scheme, or caused to be delivered by mail to the addressee in furtherance of such scheme, is a separate offense. An indictment could charge as many counts of violation of the law as there were acts of mailing or using the mails in the operation of the scheme. The indictment in this case charges in addition to the letter mentioned in count 1, the letter mentioned in count 2 addressed to Ben Redfield at Spokane, Washington, on June 13, 1946, and in count 3, the letter addressed to E. J. Gibson at Spokane, Washington, on May 25, 1946.

It is your duty as jurors to decide as to the defendant Allen first, whether there was such a scheme devised, conducted, joined in or participated in by defendant Allen, and secondly, whether the letters described in each of the three counts above mentioned were mailed pursuant to the scheme and for the purpose of executing and furthering same as alleged in the first three counts of the indictment. It is not necessary that you find that the evidence proves beyond all reasonable doubt that all of the elements of misrepresentation have been proved as to the defendant Allen, but it is sufficient in order to bring in a verdict of guilty as to counts 1 to 3 that you believe from the evidence beyond all reasonable doubt that the defendant Allen made or participated in the making of one or more of the essential acts or representations which I will later set forth, and that he made or participated in the scheme, and that the mails were used.

If the evidence fails to establish such essential elements which I will later more particularly advise you concerning, beyond all reasonable doubt, then it will be your duty to acquit the defendant Allen of the charges contained in counts 1 to 3, inclusive, or such ones of those three concerning which you have a reasonable doubt.

Counts 4, 5 and 6 of the indictment charge a violation of Section 17-A of the Securities Act of 1933, which I have previously read to you so far as applicable to this case. These counts charge that the defendants employed the scheme to defraud described in the first count, and used such scheme as described in the first count in the sale of securities as charged in counts 4, 5 and 6 by the use of the United States mail. The Securities Act makes it an offense to employ such a scheme to defraud directly or indirectly in the sale of a security, and a security within the meaning of this law includes stock certificates in a mining company. In order that you should find the defendant Allen guilty of the offenses charged in counts 4, 5 and 6, you must find from the evidence beyond a reasonable doubt that the defendant Allen devised or helped devise or joined in or participated in the essential part or parts of a scheme to sell securities in interstate commerce or through the use of the mails, directly or indirectly, that such scheme was fraudulent, and that a device, scheme or artifice to defraud was employed by the defendant, and as to these three counts, counts 4, 5 and 6, the essential parts of such scheme or artifice

in order to justify conviction will later be stated to you.

Just the same as with the mail fraud counts, it is not necessary that the evidence prove beyond all reasonable doubt each and all of the elements of misrepresentation set forth in the security fraud counts, and as referred to in count 1 of the indictment as to the defendant Allen to warrant a verdict of guilty as to these security fraud counts, but it is necessary to justify conviction as to any of said security fraud counts that the evidence establish beyond all reasonable doubt that the essential elements of said three security fraud counts with respect to the defendant Allen is proved in accordance with the instructions I will later give you as to what the essential elements to permit conviction are.

Count 4 charges the use of the mails on August 8, 1945, to Edwin LaVigne of Spokane, Washington. Count 5 charges the use of the mails on May 28, 1946, to E. J. Gibson of Spokane, Washington, and count 6 charges the use of the mails on June 12, 1946, to Edwin LaVigne of Spokane, Washington, for the purpose of selling securities in interstate commerce. In these counts likewise it is not necessary that the defendant Allen himself used the mails if you find that the defendant Allen participated in the scheme or device to defraud knowing that the mails would be used by other codefendants or employees in the perpetration of such scheme.

Count 7 charges a conspiracy among the three de-

fendants named. The conspiracy statutes as passed by Congress and interpreted by the courts provides that when two or more persons enter into a conspiracy or combination to commit any offenses against the United States, all acts done by any of them during the life of the conspiracy in furtherance of and to effect the objects of the conspiracy and unlawful agreement are chargeable to all of them. Such refers only to acts and statements made by the participants in the conspiracy and during the life and operation thereof. Anything done by any party either before the conspiracy began or after it ended will not be chargeable to anyone other than the party himself. However, it is a part of the law that when a criminal scheme or conspiracy is in operation, a person joining it at any time thereafter with knowledge of such criminal scheme or such criminal conspiracy becomes a co-conspirator, and if it was previously only a scheme of one individual, by joining it he changes such to a conspiracy as well as continuing it as a scheme.

In the present case, and with respect to statements and activities of the defendant, the question therefore is first, whether there was in operation a conspiracy or unlawful agreement or understanding among the defendants named in the indictment or some of them to violate the mail fraud law or the Security Act as charged in the indictment. If you find beyond a reasonable doubt that Allen participated in such, whether from the beginning or later during any portion of the period charged, then anything he did in furtherance of such conspiracy would be chargeable to him and

likewise anything that the other defendants or either of them did during the progress of such conspiracy while Allen was a member would be chargeable to Allen. This relates particularly to count 7 of this indictment, but as will be further stated, a scheme to defraud when the scheme is conducted by two or more persons is in substance and effect also a conspiracy. Such principle holds true with respect to counts 1 to 6, inclusive, of this indictment, which charge a violation of the mail fraud statute as to the first three counts and a violation of the National Securities Act as to the last three, providing you find beyond a reasonable doubt from the evidence that the defendant Allen participated with Keane and Grismer or either in connection with any such criminal scheme or conspiracy as charged.

Conspiracy may be established by circumstantial evidence or by deductions from facts. Common design is the essence of the crime of conspiracy, and this may be made to appear when the parties steadily pursue the same object, whether acting separately or together by common or different means, but if leading to the same unlawful result. If the parties act together to accomplish something unlawful a conspiracy is shown even though individual conspirators may have done acts in furtherance of the common unlawful design apart from and actually unknown to the others. It is not necessary for the government to prove that the defendant Allen mailed any of the letters referred to in counts 1 to 6 of the indictment, or in count 7 of the indictment, if a fraudulent scheme were devised as

alleged in the first six counts or a conspiracy was formed as alleged in the seventh count and if the defendant Allen participated therein knowing that in reasonable probability the mails would be used for the purpose of aiding in the consummation of the scheme or the conspiracy, or if letters were mailed with the approval, knowledge or acquiescence of the defendant Allen, or if the defendant Allen knew that they would probably be or customarily be mailed by some other person in carrying out the scheme to defraud, even if they were mailed by a perfectly innocent person then the defendant Allen if there was actually such mailing would be just as guilty as if he had personally mailed the letter or letters himself.

The mail matter charged to have been mailed or delivered by mail in furtherance of a scheme to defraud may be, and frequently is, as perhaps it may seem in this case, entirely innocent on its behalf as far as its actual contents are concerned. Such mail matter need not be by itself effective to carry out the scheme, and need not be actually calculated to do so. It need not contain any misrepresentations or disclose any fraudulent purpose or show on its face that it was in furtherance of any scheme or artifice to defraud, but the mail matter mailed must have some relation to and be a step in the attempted execution of the scheme or conspiracy, and such mail matter must be mailed or caused to be mailed with intent to aid and further the purpose of the scheme or conspiracy.

Fraud within the meaning of the postal laws of the

United States may be any trickery or deception, any false pretenses, representations or promises for the purpose of obtaining money or property of another. This is true even when the persons resorting to such means intend to repay what they have obtained and intend to pay it without loss to the person or company at a later date, and even though the people who resort to such means intend to pay with interest or even profit or perhaps a bonus. It is not a good defense in a case of this sort that the defendants had confidence in the ultimate success of other mining enterprises other than the corporations in which stock was issued, and intended at some future date to repay any diverted money to the corporations from other sources, and that they expected ultimately to save the investors in the Pilot and Extension companies or either of them from loss, and even make a profit for them; if they intended to obtain the money or property of others by means of false representations or promises, there would be a violation of the law by the one so intending. The people to whom the money belonged were the ones who had a right to decide whether they wished the money diverted. They're the ones who had a right to say whether or not they wished to run such risk as there might be as to a bonus, profit, interest or future repayment.

Moneys obtained from investors for the development of a particular mine upon a promise or representation that the particular mine will be developed by use of such funds must be used for that particular mine, and any diversion of money to a foreign purpose,

however meritorious that purpose may be believed to be by the defendants, is a wrongful and criminal diversion.

The devising of an unlawful and fraudulent scheme or artifice is an act of the mind. You cannot possibly enter into any defendant's mind and by reason of such physical visitation determine his intention or purpose. The evidence of intent to devise and conduct such a scheme to defraud may be shown and usually must be shown by the acts and declarations of the parties concerned, and by the attendant circumstances as well as by direct evidence when direct evidence is available. Experience shows that positive proof of fraudulent intent is not generally to be expected. For that reason, among others, the law permits a resort to circumstantial evidence as a means of ascertaining the truth.

In order to constitute the offenses charged in this indictment it is not necessary to show that the defendants intended to defraud every person with whom they may have had dealings, or that the entire course of the transaction was a fraud. It is not necessary to show that all the moneys of the companies were diverted. No defendant would have the right to represent that all the money was to be used for the development of a certain company, and then divert only five per cent or one per cent; neither is it necessary to show or prove that the scheme or artifice or the conspiracy was all developed at one time. It may have been formed gradually.

* * * * * *

The Court: I realize, ladies and gentlemen of the jury, that the instructions, which are far from completed are long and difficult. The charge is complicated. There's seven counts, but if the defendants are guilty beyond all reasonable doubt they have no right to complain because they're charged with the complications which if they're guilty they constructed.

With respect to the several features of the scheme to defraud described in the first count of the indictment, you are instructed that it is necessary for the government to prove beyond a reasonable doubt at least some of the essential false pretenses, representations or promises therein charged and which I will later specify to you, were actually made. It is not necessary that all the allegations of the indictment be proved. However, it may all be proved. The government is only obligated to prove the essential ones. A scheme to defraud may be effected by one material misrepresentation, although where more are charged they may all be proved, but they need not all be proved.

To find the defendant Allen guilty of the offenses charged in any of the counts of the indictment it is not necessary to find that he committed personally all of the acts charged in such count or counts. The law holds that anyone who knowingly aids, abets or counsels in the commission of a crime for the purpose of aiding such commission is legally as guilty as if he individually perpetrated the entire crime himself. One may join a conspiracy after it has been formed, or may join a scheme of one individual and thereby not

only continue it as a scheme, but also make it a conspiracy, and if he participates knowingly for the purpose of aiding in the commission of a crime, he becomes a party thereto and is responsible just as though he was the one who originally conceived and planned the entire plan or conspiracy. One actor may drop out of a conspiracy and the others continue, or a new one may join, without the conspiracy terminating.

As I've already told you, a conspiracy may be proved either by direct or circumstantial evidence. It is not unusual for it to be proved by the use of circumstances. Men who agree to violate the statutes of the United States do not very often call in a stenographer and prepare a written agreement to that effect, or if they do, they do not usually make it available to any investigators. For this reason the law says that in a conspiracy case the government may be permitted to present its case on what the law calls circumstantial evidence. That is what the government is striving to do here. It contends that certain things happened and certain events occurred. It contends these could not have happened by mere coincidence unless there was an agreement or concert of action between at least two of the defendants, therefore it asks you as the jury to consider that there must have been a conspiracy. The government has the right to so contend, yet when it does ask for a conviction on circumstantial evidence, then it has the burden not only of proving the facts and circumstances beyond all reasonable doubt, but it must also satisfy you beyond all reasonable doubt that such circumstances are only consistent

with guilt. You must believe before you can find any defendant guilty in this cause that the circumstances proved as to him exclude all possibility, exclude all reasonable possibility of his innocence, and that after considering all the inferences reasonably to be drawn from the circumstances, your sound judgment requires you to reject other inferences and accept only the inference of guilt.

The law requires that you study all the evidence and that you weigh carefully the conclusions or the inferences favorable to the defendant as well as those unfavorable. The witnesses Francis C. Keane and Joseph V. Grismer in this case are confessedly what is known in law as accomplices. The fact that a witness is what is known as an accomplice doubtless operates and ought to operate largely against the credibility of his testimony, but the jury is not bound to reject such testimony merely because the witness is an accomplice. Accomplices are competent witnesses. Frequently the only proof of law infraction has to be through an accomplice or accomplices. It is your duty to consider the testimony of Mr. Keane and Mr. Grismer and each of them, but in so doing you should weigh the testimony of each and scrutinize the testimony of each with great care. You are to test the truthfulness of each of them by inquiring into the probable motives which prompted their testimony, and are to decide to what extent such motives might have colored or warped it. You are to look into the testimony of other witnesses in this case for corroborating facts or circumstances; where the testimony of an accomplice is sup-

ported in material respects by trustworthy evidence or by the facts and circumstances which you find to have existed beyond a reasonable doubt, then you ought to credit the testimony of an accomplice, but where the testimony of an accomplice is unsupported and uncorroborated, you should not rely upon it unless after the exercise of great care and careful scrutiny it produces in your minds beyond all reasonable doubt the conviction of its truth, and in such event, if you believe the testimony of an accomplice to be true beyond all reasonable doubt, you're justified in convicting upon the testimony of that accomplice without any corroboration at all.

You are the exclusive judges of what is the evidence in this case and of the weight and credit to be given the testimony of each witness. In doing this you should take into consideration the conduct and demeanor of the witness while testifying, his or her apparent candor and frankness or lack of such qualities, the reasonableness or unreasonableness of his or her testimony, its probability or improbability as measured by your common experience in life, the opportunity on the part of any witness of knowing or being informed concerning the matters about which he testifies, his intelligence or her intelligence or lack of intelligence, any prejudice or bias disclosed by him or her, any motive in your judgment which would cause him or her to warp or color the testimony one way or the other, and the interest, if any, which he or she may have in the outcome of the case.

If you find that any witness in the trial of this cause

either for the government or for the defendant has wilfully, that is intentionally and knowingly testified falsely as to any material fact, that is, as to any fact important in the case, then you are at liberty to disregard his or her entire testimony except insofar as such testimony is corroborated, that is, supported by other testimony which you accept as worthy of belief, or as corroborated, that is, supported by the facts and circumstances which you find to have existed under the evidence. These rules as to the testing of the testimony of any witness apply to the witness James Anthony Allen, the defendant on trial, as well as to each and every other witness in the case.

In the course of your deliberations you are not to consider in any manner sympathy for the defendant or members of his family, or any prejudice that you may have against him either personally or as a person engaged in mining enterprises, and if you are convinced beyond all reasonable doubt by the evidence of the guilt of the defendant Allen as to any count or counts, it is your duty to convict him of such count or counts, and you must not permit any prejudice, if any you have against the defendant Keane, to interfere. The trial is not the measure of the respective merits or any merits of the defendants Keane and Allen. It is to determine whether or not the defendant Allen is guilty. The defendant Keane has already pleaded *nolo contendere,* and the Judge before whom he appears will determine his responsibility.

The defendant Allen cannot of course be found guilty

of the commission of one or more of the offenses charged in counts 1 to 6, inclusive, or of the conspiracy count, count 7, by proof alone that he aided, abetted, or counseled the doing of the overt acts charged in paragraph 2 of each of said first six counts, or the overt acts charged in count 7, unless and until you further find from all of the evidence in the case beyond all reasonable doubt that he did such knowingly and intentionally to effect the scheme, artifice or conspiracy charged.

You are instructed that any fraudulent act done or intent entertained by the defendant Keane not disclosed to the defendant Allen would not be binding upon the defendant Allen or chargeable against him even though he may have directly or indirectly profited thereby. In order for the defendant Allen to be responsible for any unlawful act on the part of the defendant Keane, the defendant Allen at the time he shared in any such profits must have known that Keane had the scheme or was a part of the conspiracy charged. The defendant Allen is not charged in this case with the crime of embezzlement. This court would have no jurisdiction of a charge of embezzlement alone. Such a charge as far as the Lucky Friday Extension or Pilot companies would have to be prosecuted in the state courts, probably in the state courts of Idaho. Embezzlement, if there was such, becomes important only if the mails are used in connection with a scheme or conspiracy involving diversion of funds, either in connection with the scheme or conspiracy to violate the mail fraud law or the Federal Securities Act.

You are instructed that the defendant Allen had the legal right to sell any stock in the Pilot or Extension companies owned by him upon the following conditions: First, that such sale occurred after the expiration of one year after the date of the first offering of such corporation's stock for sale through an underwriter, or second, upon brokers transactions executed upon customer's order on any exchange or in the open or counter market, but not on the solicitation of such orders, but this right of the defendant to legally sell any such stock would only extend to such stock as he was selling independent of any criminal scheme or conspiracy to violate the mail fraud law or the securities act.

Again I may advise you that what punishment the defendant may receive in the event of his conviction of any count or counts is not to be considered by you in any respect or for any purpose in arriving at your verdict. The matter of punishment is for the Court alone. When you retire to the jury room it will be your duty as jurors to confer with each other freely and frankly about and to discuss with each other honestly the many questions involved in this case, for the purpose of agreeing, if you can honestly do so, on a unanimous verdict as to each of the seven counts in the indictment; however, your verdict as to each of the seven counts must be the honest verdict of each and all of you.

While as I have already advised you the law of this case is for the judge, and it is your duty implicity to

accept and faithfully follow as correct all of the rulings that the Court has made in this case as well as to accept as correct the instructions now being given to you, I wish to tell you this further, that what the evidence shows, what weight you are to give the testimony of the various witnesses, and particularly what inference you should draw from the facts and circumstances proved, are exclusively your function. In respect to that you are independent, controlled neither by any opinion that the court may have or that you think the court may have, and in the event you think that I have already, or come to think that I have expressed an opinion about the guilt or innocence of the defendant Allen, or as to the credibility or weight to be accorded any testimony of any witness, this is to let you know that you're not bound or controlled at all by what the court thinks or by what you think the court thinks as to what the verdict should be. Such is your responsibility.

When a defendant testifies in his own behalf you may consider what interest he has in the outcome of the case and whether that interest has been sufficient to lead him to deny things that really are true, or to testify to things that are not true. You will weigh his testimony the same as you weigh the testimony of every other witness in the case.

There are two kinds of evidence, direct and circumstantial. Direct evidence is evidence of that which a person observes or sees, or which is susceptible of demonstration by the senses. Circumstantial evidence is

proof of such facts and circumstances concerning the conduct of the parties which conclude or lead to a certain inevitable inference or conclusion. Circumstantial evidence is legal and competent as a means of proving guilt in every criminal case, but the circumstances must be consistent with each other, consistent with the guilt of the party charged, inconsistent with his innocence, and inconsistent with every reasonable theory except that of guilt. When circumstantial evidence is of that character, circumstantial evidence alone without any direct testimony at all is sufficient to convict, providing the jury is convinced beyond all reasonable doubt of the guilt of the defendant merely from circumstantial evidence, or if the jury is convinced by a combination of circumstantial and direct evidence of the guilt of the defendant as charged beyond all reasonable doubt, then the jury should return a verdict of guilty upon such combination of evidence, providing it is consistent with guilt, inconsistent with innocence, and inconsistent with any reasonable theory except that of guilt, or if the jury is convinced by direct testimony of the guilt of the defendant as charged, beyond all reasonable doubt, it is the duty of the jury to convict upon such direct testimony, but again it must be consistent with guilt, inconsistent with innocence, and inconsistent with any reasonable theory except that of guilt.

You may find the defendant Allen, in the event you are convinced beyond all reasonable doubt of his guilt, guilty of all seven counts of the indictment, or you may find him not guilty as to each of the seven counts, or

you may find him guilty as to some and not guilty as to others, depending upon whether or not you are convinced beyond all reasonable doubt as to such respective counts.

You are instructed that it is no defense that some other person or persons should also have been prosecuted.

It is not necessary to prove that the offenses charged in any count was or were committed upon the exact day alleged in the count. It is necessary that the evidence should show beyond a reasonable doubt that it was committed on or about the times or periods charged, and in any event, within three years before the return of the indictment, that is, at any time between May 6, 1945, and May 6, 1948.

When you retire to the jury room to deliberate upon your verdict you will select one of your number as foreman. You will consider your verdict as to each count separately, and will vote separately as to the guilt or innocence of the defendant as to each count. When all of you have agreed upon your verdict unanimously as to each of the seven counts, you will cause your foreman to fill in the verdict and sign such, and then you will return into open court. You will take with you to the jury room the exhibits which have been admitted in evidence, the indictment, and the form of verdict. The indictment is not in evidence and is not proof of anything, but will go with you to the jury room so that you will be better informed of the nature of the various counts and of the dates of the various

letters alleged. The verdict is in the usual form, and reads as follows: "District Court of the United States, Eastern District of Washington, Northern Division. United States of America, Plaintiff, vs. James Anthony Allen, Defendant, C-7975. We the jury in the above entitled cause find the defendant James Anthony Allen blank guilty as charged in count 1, blank guilty as charged in count 2, blank guilty as charged in count 3, blank guilty as charged in count 4, blank guilty as charged in count 5, blank guilty as charged in count 6, and blank guilty as charged in count 7 of the indictment. Blank, foreman." When you have unanimously agreed as to your verdict as to each of the seven counts, you will cause your foreman to fill in the blanks as follows: If as to count 1 you unanimously agree that the defendant Allen is guilty, you will cause your foreman to write in the word "is" in the blank before "guilty" so that it will read "is guilty." If you unanimously agree that your verdict as to count 1 should be not guilty, you will cause your foreman to write in the word "not" in the blank before "guilty" so that it will read "not guilty" and similarly as to each of the seven counts. You must have the foreman fill in the word "is" or the word "not" in each blank before each word "guilty" as to each of the seven counts, then your foreman will sign the verdict.

You may, as I've said, find him guilty as to some counts and not guilty as to others, or guilty as to all, or not guilty as to each one of the seven.

There are many exhibits which have been introduced in this case. It's not my intention to try to hurry you in arriving at your verdict. You of course are privileged to return your verdict quickly if you conscientiously arrive at such quickly, but the jury has a right and a duty to consider all the evidence and each and all of the many exhibits to that extent as is necessary or helpful to the jury in arriving at the correct verdict in each case, each count, to the best of the jury's ability. I think this is an appropriate time for a recess. There will be one of five minutes.

* * * * * *

The Court: There has been considerable mention in the argument by counsel on both sides as to what has been called Exhibit number 130, a combination of a trust agreement and a compromise agreement. You're not bound or controlled by any idea I may express as to the weight you should give that exhibit. You're privileged to give it the weight you think it is entitled to receive. I'm privileged to tell you, however, that personally I do not feel that that exhibit in any wise sufficiently weighs against the defendant to justify your returning any verdict against him on that account. It was a compromise, and it is generally the law that people make compromises for the purpose of settling that particular matter or matters, and that they do not expect to be held responsible on account of that settlement in some other transaction, and I'm letting you know that while you're free to give that exhibit the weight you think it is entitled to receive, that per-

sonally I consider that you'd be well justified in not holding that exhibit in any wise as against the defendant Allen.

You are instructed that in the event you are convinced by the evidence in this case beyond all reasonable doubt that the defendant Allen is guilty as charged of one or more of the counts of the indictment, it will be your duty to convict the defendant Allen of such count or counts regardless of how much more active in any such violation you may find some other person or persons to have been, regardless of whom you may find to have been the originator of any scheme or conspiracy, regardless of whom you may find to have been the dominating individual in connection with it, regardless of whether or not ultimately there was a profit or loss from any such over-all transaction, regardless of how interested you may find him to have been in any central development project, regardless of whether or not he spent any money in gambling, regardless of whether or not the original Lucky Friday Mining Company, usually referred to as the Big Friday, had more to gain or did gain more from the organization of the Lucky Friday Extension Mining Company and the Pilot Silver Lead Mines, Inc., or either of them than did the defendant or either of them, regardless of whether or not the defendants Allen and Keane had differences and parted company, regardless of how justified Allen was in having Keane removed from any authority in the management of the companies or either of them, regardless of whether or not one John Sekulic was or was not the one who originally

suggested the organization of the Extension Company, and regardless of whether or not after commission of such offenses Allen put in substantial sums in the Extension or Pilot or both.

However, in determining the guilt or innocence of the defendant Allen as to each of the counts, and in determining the reasonable probabilities and the reasonable credibilities, motives, and incentives of the respective witnesses, including the defendant Allen, you should give serious consideration to each and all of the foregoing as well as to all of the rest of the evidence, including the exhibits, and to all of the facts and the circumstances disclosed by the evidence, whether I've referred to such or not.

You are instructed that if a person knowingly, intentionally and wilfully violates the law, he is responsible for such violation regardless of whether or not he is to get any profit therefrom and regardless of whether or not if he expected a profit the share he expects of any benefits or profits that may be realized is large or small, regardless of whether or not he actually obtains the share he expects or is completely disappointed, and regardless of whether or not his share is or is intended to be greater than, equal to, or very much smaller than that of some other person with whom he is associated, or greater than, equal to or less than that part of some innocent party or company who participates in some part of the activity.

While I have told you that if you find any witness on any side of this case, including the defendant, has

wilfully, that is, intentionally, and knowingly, sworn falsely as to any material fact on the trial, that you are at liberty to disregard the entire testimony of such witness except as such has been corroborated, as I've told you, by other testimony or circumstances which you accept as true, this is to let you know that you do not have to disregard the entire testimony of a witness if you find that that witness has intentionally, wilfully sworn falsely to some material fact. If you find that a witness has wilfully and intentionally sworn falsely as to some material matter or fact, and you further find that he has testified truthfully as to some other matter or matters, and you determine that you can separate the false from the true, while you are at liberty to disregard the entire testimony of such witness except as it has been corroborated, as I've already stated to you, you are not required to disregard that portion of his testimony which you find to be true, but if you find that any witness on any side of the case, including the defendant, has wilfully sworn falsely as I've previously stated, as to any material matter, you're not required to undertake the difficult task of separating the chaff from the wheat, or the false from the true, and are at liberty to disregard all of the testimony which is not corroborated, that is, supported, as I've stated.

If you should find that any witness or witnesses have intentionally testified falsely as to any material matter in the trial, and if you have because of that decided to disregard the entire testimony of such witness or witnesses except as such has been corroborated,

as I've stated to you, then you should determine whether or not the remaining evidence establishes the guilt of the defendant Allen beyond all reasonable doubt as to the seven counts or any of them. In the event it does so establish his guilt beyond all reasonable doubt as to the seven counts or some of them, then it will be your duty to return a verdict of guilty in accordance therewith regardless of the fact that you may have disregarded the testimony of one or more witnesses for what you find to have been wilfully false testimony. I'm not suggesting by this that I do or do not believe that the defendant Keane or the defendant Grismer or the defendant Allen or any other witness has wilfully, knowingly or intentionally testified falsely as to any material matter. The determination of whether any witness or witnesses, including the defendant Allen, testified truthfully or otherwise is your responsibility.

In this case if you are convinced by such evidence as you consider worthy of belief, including the facts and circumstances which you find from the evidence existed, that the defendant Allen is guilty beyond all reasonable doubt as charged in one or more of the counts, it will be your duty to so find, regardless of how much or how little credence you may give to the testimony of the defendants Keane and Grismer or either of them.

In such connection, had the defendants Keane and Grismer or either of them come to trial before you in this case upon pleas of not guilty as to each and every count, along with the defendant Allen, and had either

or both of the defendants Keane and Grismer declined, as they would have had the right to decline, to take the stand, so that there would have been no evidence from them or either of them, it would still have been your duty to have found each of the defendants including the defendant Allen guilty providing you were so convinced beyond all reasonable doubt from the evidence before you without the testimony of Keane or Grismer or without the testimony of such one as did not testify. That is, you are instructed that the testimony of neither Keane nor Grismer is necessary to the government's case against the defendant Allen providing you are convinced beyond all reasonable doubt of the guilt of the defendant Allen from the other testimony, including the exhibits, facts and circumstances proved in the case to your satisfaction beyond all reasonable doubt. However, if you should disregard the testimony of any witness or witnesses, whether or not it be that of Keane and Grismer or either of them, and are not convinced beyond all reasonable doubt by the remaining testimony of the guilt of the defendant Allen as to any count or counts, then you should acquit the defendant Allen as to such count or counts concerning which you find a lack of testimony.

If you find beyond all reasonable doubt that the defendant Allen under all the evidence which you consider as worthy of belief is guilty of one or more of the counts charged in the indictment, you should return a verdict to such effect, regardless of whether or not you find that the defendant Keane deceived and cheated the defendant Allen or attempted to do so, and

regardless of whether or not Keane was as incapacitated from liquor as he testified. This prosecution is on behalf of the people of the United States, and if the evidence establishes the proof of the guilt of any person beyond all reasonable doubt, the fact, if it be a fact, that some associate in the violation was disloyal to the defendant on trial, or was otherwise guilty of misconduct, will not relieve such defendant on trial from his responsibility to the government and to the public for the violation.

In connection with each of the first three counts of the indictment, in order to sustain a conviction it must be established by the evidence beyond all reasonable doubt in addition to the other requirements for conviction, that the defendant Allen knowingly, wilfully and intentionally participated to some substantial degree in the scheme or artifice therein alleged, before the mailing of the particular letter charged in such mail fraud count. As to the next three counts in which fraud is charged in the sale of a security, in addition to the other requirements for conviction it is essential for conviction of the defendant Allen as to each of said Security Fraud counts that the evidence is established beyond all reasonable doubt that the defendant Allen knowingly, wilfully and intentionally participated to some substantial degree in the scheme or artifice described in mail fraud count 1 and referred to in and made a part of each Security fraud count, before the mailing of the particular letter charged in such Security fraud count.

As to count 7, the conspiracy count, it is not necessary for conviction that the evidence establish that the defendant Allen joined such conspiracy at any particular time, providing the evidence establishes beyond all reasonable doubt that the defendant Allen knowingly, wilfully and intentionally joined and participated in any such conspiracy before May 6, 1948, when the indictment was returned, and also before the commission in Spokane, Washington, of any one or more of the overt acts consisting of mailing or delivery of mail in Spokane, Washington, charged in count 7 and relating to that company or these companies concerning which you find the defendant Allen beyond all reasonable doubt conspired. In this connection it will be your duty to find the defendant Allen guilty of such conspiracy count if you find from the evidence beyond a reasonable doubt that he so knowingly, wilfully and intentionally joined and participated to some substantial degree in the conspiracy as charged either in connection with the Extension Company or the Pilot Company before the commission in Spokane, Washington, of at least one of the overt mailing acts charged and relating to that company concerning which you may find he conspired, even though he might not have had any connection with the other company, and even though some other person or persons may have participated from the beginning in such conspiracy and to a much greater extent.

You are advised that if a person by the doing of one act violates more than one Federal law he may

be prosecuted by separate counts for the different violations of different laws arising out of the same action. In a conspiracy charge there must be at least two involved; while the conspiracy count charges three, it's not necessary that the evidence establish that more than two were involved, but Mr. Allen cannot be convicted of conspiracy unless you find beyond all reasonable doubt that he conspired either with Keane or with Grismer.

You are instructed that you're justified in finding that the letters of notification and the prospectuses of the Pilot and Extension companies constituted representations. You have a right in considering the evidence to determine whether or not the defendant Allen's manner of keeping his records and receiving and paying money was in accord with his natural way of conducting his business, or whether it was wilfully done for the purpose of hiding and concealing his true connections with the Pilot and the Extension or either of them, or whether it was for the purpose of carrying on his business in the usual way, or was for the purpose of confusing or harrassing investigators.

In connection with this case, if you should find beyond all reasonable doubt that the defendant Allen knowingly, wilfully and intentionally diverted money on or about August 7, 1945, and on or about August 28, 1945, which belonged to the Extension Company, or on either of such dates or on or about either of such dates, that that would be sufficient to connect him with diversion of funds as charged, even though you should not be convinced beyond all reasonable doubt as to

other diversions, and in the event you should find beyond all reasonable doubt that he did knowingly, wilfully and intentionally divert money on or about either of the two dates of August 7 or August 28, 1945, and further find as charged in the indictment that such was done knowingly, wilfully and intentionally as a participant, even for that temporary period, in the scheme charged and the conspiracy charged, such would justify conviction of the defendant Allen as to such of counts 1, 4 and 7 as you might find under the evidence the defendant Allen was guilty of beyond all reasonable doubt, providing the respective mailings charged were mailed after any such diversion, in the event you should so find.

As to count 1 of the indictment, in the event you find beyond all reasonable doubt that the defendant James Anthony Allen as charged devised, joined or participated in, wilfully, knowingly and intentionally, any scheme or artifice to defraud purchasers and prospective purchasers of stock of the Lucky Friday Extension Mining Company, and that it was a part of such scheme, known to and participated in by such defendant Allen, that concealment would be made to the public and investors and prospective investors that Allen was a promoter of the Extension, and it also is established beyond a reasonable doubt that he was such a promoter before and during the organization of such companies, or if you're satisfied beyond all reasonable doubt in connection with count 1 that the defendant Allen knowingly, wilfully and intentionally participated in the scheme knowing and intending that the

Extension was to sell stock to investors upon the representation that the proceeds thereof would be used by the corporation for the exploration and development of the mining property of the Extension, and that in fact, such, to the defendant's knowledge, was not so used, or that the defendant Allen knowingly, wilfully and intentionally devised or joined in or participated in such scheme with the intention that a portion of the money due the corporation from its treasury stock would be appropriated and diverted from the Extension, or if the defendant Allen knowingly, wilfully and intentionally joined in such scheme as to the Extension, intending and agreeing that certain stock would be given to any attorney under the pretense that it was for attorney's fees, but that actually a part of it would come back to him as a promoter, for the purpose of defrauding the public, and if you further find beyond all reasonable doubt that after joining any such scheme and in connection therewith, and pursuant to the intention, the letter charged in paragraph two of count 1 was delivered at Spokane, Washington, as charged, then it would be your duty to find the defendant Allen guilty in any of said events of count 1, otherwise not guilty as to count 1.

I'm making it clear to you that he can only be convicted as to count 1 in the event he knowingly, wilfully and intentionally participated in the scheme in the method I have just stated with respect to the Extension Mining Company. That is because, although it's charged that he entered into a scheme both as to the Extension and the Pilot, the critical letter was mailed

before the Pilot under the evidence was organized or contemplated, so count 1 will only justify a conviction against the defendant Allen in the event he knowingly, wilfully and intentionally devised, joined or participated to a reasonably substantial degree in the scheme in one of the ways I have stated.

As to counts 2 and 3, the defendant Allen can only be convicted in the event he knowingly, wilfully and intentionally devised or helped devise, joined in or participated to a reasonably substantial degree in the same way or ways as to the Pilot Company as I have previously specified was necessary for the Extension, and then only if such devising, joining or participating was before the mailing and delivery of the letter mentioned in paragraph 2 of count 2, which was on June 13, 1946.

Similarly, as to count 3, the defendant can only be convicted as to count 3 provided he knowingly, wilfully and intentionally devised or helped devise or joined in or participated to the same degree in a scheme involving the Pilot, and before May 25, 1946, the date mentioned in count 3.

As to counts 4, 5 and 6, he can only be convicted as to count 4 in the event he joined, devised, helped devise or participated similarly in a scheme involving the Extension—just a moment, was that count 4?

The Reporter: Yes, your Honor.

The Court:—in the Extension before the mailing and receipt of the communication alleged to have been

sent or received on or about August 8, 1945, in the second paragraph of said count 4.

As to counts 5 and 6, the defendant Allen can only be convicted in the event you find such devising, joining or participating in a scheme involving the Pilot and before the respective letters therein involved.

As to each and every of said six counts, not only must you find such beyond all reasonable doubt, but you must find beyond all reasonable doubt that the letter was mailed or caused to be mailed or in the natural course of events should have been known by Allen that it would be mailed, and that it had for its purpose the furthering of the scheme as to the Extension in counts 1 and 4, as to the Pilot in counts 2 and 3, 5 and 6.

As to count 7, you can only find the defendant Allen guilty in the event you find that he knowingly, wilfully and intentionally devised or helped devise, joined or participated to a reasonably substantial degree in the conspiracy therein alleged, and that such conspiracy was for the purpose of doing at least one of the several things which I defined to you as necessary in order to justify conviction on count 1, and in addition, the evidence must establish beyond all reasonable doubt that the defendant either helped organize, joined in, or participated in such conspiracy knowingly, wilfully and intentionally before the doing of at least one overt act in Spokane, Washington. The reason that such must have been done in Spokane, Washington,

is to give this Federal Court in the State of Washington jurisdiction.

You shall consider all of the overt acts for such light as they may throw upon the guilt or innocence of the defendant. In addition, as to the conspiracy count, it is necessary that the particular overt act shall have consisted of the mailing or receiving through the mails of a letter or certificate related to the particular company concerning which the defendant Allen was involved in the conspiracy. If you find that the defendant Allen was involved in the conspiracy from the beginning, and as to both companies, then the commission of an overt act as to either company will suffice, but if you find that he was not involved in the Extension scheme or conspiracy, but do find beyond all reasonable doubt that he was involved in, as I've stated was necessary, a conspiracy involving the Pilot, it will be necessary for you to find that he joined or knowingly participated or knowingly joined, of course, such conspiracy before the mailing or the receiving in the mails at Spokane, Washington, of one of the letters relating to that particular company and described in the overt acts in the indictment.

You will have the indictment with you for your assistance and better understanding of the charges. It will be your duty to consider all this evidence carefully, impartially, dispassionately, for the purpose of arriving at the truth, and in doing such you will draw upon your experience, your judgment, your common sense, your understanding of the probabilities. You will re-

member at all times that you're officers of the court, under oath, charged with the duty of returning the correct verdict as to each count, and because there are so many exhibits you cannot properly discharge your duty as jurors until you have sufficiently examined and understood the various exhibits as to permit you intelligently and honestly to return the proper verdict as to each count.

You should view this testimony and all of the facts and circumstances in the same light as if you had been dispatched for the honest purpose of investigating this case and determining as an investigator whether or not the defendant Allen was beyond all reasonable doubt guilty, and if you had been such an investigator conscientiously performing your duties as an investigator, and if you had had presented to you all of the facts and circumstances and exhibits as have been introduced in this case, what would your decision have been as to whether or not you were then satisfied as honest, conscientious investigators as to whether the defendant Allen was shown beyond all reasonable doubt to be guilty.

If you would then have decided conscientiously and honestly that he was guilty of one or more of the charges, it would be your duty to have the same view here. If under such circumstances you would have an honest, conscientious, reasonable doubt, it's your duty to have the same honest, conscientious, reasonable doubt here. In one event you should return a verdict of guilty, and in the other event of course a ver-

dict of not guilty. You will now retire, not to consider this case. You will retire until called.

* * * * * *

The Court: Members of the jury, the Clerk of the Court for your convenience and with the consent of counsel on both sides has prepared a list of the exhibits by number which have been admitted, with a brief reference thereto, and they will be contained in various envelopes with the exhibit numbers indicated on the envelopes, so by referring to the list you may be able to look for, get and examine the respective exhibits. One exhibit, a picture, won't go in an envelope, so it will be outside.

I think I made it clear, but I wish to make it clear that all the evidence and all the circumstances which you find against the defendant as to any count and each and every part thereof must be established by the evidence to your satisfaction beyond all reasonable doubt, and while there are some more allegations in the charges than I mentioned as requisite for conviction, this is to let you know that the proof to your satisfaction of any portions of the charges other than one or more of the essentials which I specified with respect to count 1 and then by reference to the other counts, will not justify conviction, but if you find beyond all reasonable doubt one or more of the essentials that I specified to you, coupled with knowing, wilful and intentional devising, joining or participation in the scheme or conspiracy, and also find the

mailing as I've stated, such will substantiate conviction.

You of course will not consider any misrepresentation against the defendant Allen except such as was charged in count 1 of the indictment and by reference made a part of the other counts.

With respect to the instructions given, the court is satisfied that the defendant Allen and his attorneys in no wise objected to the length of the instructions or the complexity of such, and if any inference was given by the court in that respect, the jury will certainly disregard such.

I might say the number of the counts and the nature of the charge required me to give a much longer charge or instructions than I wish I could have felt satisfied to have given.

I as an example said you had a right to consider what your view would be if as honest, conscientious investigators you had investigated this matter with the honest, conscientious desire of arriving at the truth. In such connection I thought I made it plain to you, if I did not I would wish it understood that if you should so conduct an investigation it would be understood that you'd have all of the evidence presented to you, both exhibit and oral, as was presented here, and that you'd see the same manner of presentation by the individuals who appeared before you as the individuals displayed to you on the witness stand.

In the indictment it is charged that among other

things, the defendants in order to conceal the true amount of stock issued to them would and did cause large blocks of stock to be isued to Elmer E. Johnston of Spokane, Washington, and James E. Gyde of Wallace, Idaho, under the pretense that such stock was in payment of attorneys' fees, with the secret arrangement that a portion of such stock or the proceeds from its sale would be turned back to the defendants. This is to let you know that if you find beyond all reasonable doubt that the defendant Allen knowingly, intentionally and wilfully before the organization of either of such companies entered into any such agreement with such attorneys or either of them with the understanding that he was to get back part of such stock because he was a promoter, and so as to conceal such, that that would justify you in finding that he was a promoter, but you are instructed that if the evidence convinces you that Allen received any such stock and sold same to his profit, that that would not alone justify you in finding any guilt on the part of the defendant Allen unless you further find beyond all reasonable doubt that such was done knowingly, wilfully and intentionally by him in pursuance of a scheme or conspiracy to defraud and use the mails as a secret promoter as charged in the indictment, but if you find that Allen got some of that stock and sold it, that alone does not constitute any basis for conviction of the defendant Allen. The bailiffs may come forward and be sworn.

(Whereupon, Irene Keenan and R. R. Isaacs were sworn as bailiffs.)

The Court: You will take with you the exhibits, the form of verdict, the indictment, not as evidence, but merely as an aid to your memory, your recollection of the instructions, and your consciousness of the fact that you are jurors under oath and you will talk with each other just as much as may be helpful or necessary about every element of this case, about every witness, and every exhibit, and you'll give due regard to each other's opinion with the aim of arriving at a unanimous verdict as to each count, if you can honestly do so. There's no reason at all that you should endeavor to try to hurry your decision until you can actually unanimously and honestly agree as to each count. If that means that you can't do that until tomorrow afternoon, that's all right. If you can't do it until Sunday, it's your duty not to return your verdict until Sunday or such further time as is requisite for you performing your duties as jurors.

You may retire to consider your verdict. Just a moment; the alternate juror is especially thanked by the court for his services. He's now discharged. You've been a reserve soldier; you might have been essential. I'll tell you one thing; you're not obliged to tell anybody what your verdict might have been. If anybody asks you what your verdict would have been, you can say you don't care to comment, and as a matter of fact, you don't know what your verdict would have been; you might have an idea one way, but if you were to retire to the jury room and examine these exhibits and get the views of these eleven other jurors you might find the verdict you would return was just ex-

actly the opposite from what you would have returned alone, so you have no obligation to tell anyone. Thank you, and you're excused (1195-1249).

SECOND SET OF INSTRUCTIONS

Court's Instructions to Jury After Jury Had Been Deliberating on Its Verdict for More Than Twenty-Four Hours.

The Court: Members of the jury, I have thought of the question which you presented to me before dinner. The question itself is short, and an apparent short answer would be that the first paragraph of count 1 of the indictment is repeated by reference in each of the other counts and also in the conspiracy count. I'm satisfied that that was not the question that troubled you, because you have the indictment with you, and you can read as well as I that in each of the subsequent counts the grand jury re-alleges as to counts 2, 3, 4, 5 and 6 all of the allegations of the first count of the indictment except those in the last paragraph of the first count, and you can likewise read as well as I can that in count 7, that paragraph 1 of the first count of the indictment is re-alleged.

I assume that there are two problems troubling you. One is whether or not the defendant is not charged seven times with the same offense, and the other is whether or not it is necessary for the government to establish in connection with each count each and every allegation of the first paragraph of the first count. I may tell you in the first instance that the defendant is not charged seven times with the same offense. Second, it is not necessary that the government in connection with each of the subsequent counts prove every

allegation in the first paragraph of the first count. As a matter of fact, I told you yesterday that even as respects the first count, the government was not required to prove, although it was privileged to prove, all of the allegations of the first count, but it was not required so to do. For instance, as far as the first count is concerned, it is not necessary, as I told you yesterday, that the government prove that more than one person was connected with the scheme in the first count, although it was proper for the government to prove that there were two or three, and likewise I told you yesterday that as to counts 2, 3, 4, 5 and 6, that it was not necessary that the government prove that more than one person was involved in the alleged scheme, although it was proper to prove that there were two or three, but I did tell you that as to count 7, the conspiracy count, it was essential that the government prove that there were at least two involved, or it could not be a conspiracy, and in substance I advised you that if a scheme involved only one person, it was just a scheme, but that if it involved more than one person, the scheme was still a scheme, but it was also a conspiracy.

I further advised you yesterday that when one or more individuals devised a scheme to defraud, and that such scheme involved the using of the mails, that each time the mail was used was a separate offense, and that there could be as many counts as there were letters or other articles of mail as described in the law mailed, although the government was not required to charge as many counts as there were uses of the mail.

Now, as far as the first count is concerned, as I advised you yesterday, although the first count charges a scheme involving both the Extension and the Pilot Companies, as to the first count it's only necessary that the government prove beyond all reasonable doubt that the scheme involved the Extension, although it is all right if the government proved that it involved both, but as to the first count, the defendant cannot be found guilty, even if all the necessary and essential matters alleged are proved beyond all reasonable doubt, including the mailing of the letter, unless he at least was involved in the scheme with respect to the Extension and as to the first count it doesn't make any difference whether he was involved or not involved in any scheme affecting the Pilot.

As to the second count, as I told you yesterday it is essential that the government prove beyond all reasonable doubt in order to gain a conviction as to the second count, that Mr. Allen was involved in a scheme, as I instructed you yesterday, with respect to the Pilot, and as to the second count it doesn't make any difference whether the scheme involved the Extension or not.

Similarly, I told you yesterday that in order to justify a conviction as to the defendant Allen as to the third count, the scheme had to involve the Pilot Company; as I instructed you yesterday, it doesn't make any difference whether it involved the Extension or not, as to the third count.

As to the fourth count, the Security fraud count,

the letter there charged is charged as having been in connection with the Extension, so it is necessary that the fraud charged, in order to justify a conviction, it is necessary that any fraudulent scheme proved in order to justify a conviction as to the fourth count shall have involved the Extension, and it doesn't make any difference whether the Pilot was connected with such scheme or not; but as to the fifth and sixth counts, as I told you yesterday, the scheme in order to justify conviction of Mr. Allen as to either the fifth or sixth counts necessarily had to involve the Pilot, without it making any difference whether the government proved it did or did not involve both companies; so as to the first and fourth counts, in order to justify a conviction, in addition to the other things that I told you yesterday had to be proved beyond all reasonable doubt, it's necessary that the evidence establish that the scheme was in connection with the Extension Company, regardless of whether or not the Pilot was or was not involved. In order to justify conviction as to the second, third, fifth and sixth counts, or any of them, the evidence must establish beyond all reasonable doubt, in addition to the other matters I advised you yesterday, that it was the Pilot Company that was involved in the scheme, so that if you should be convinced beyond all reasonable doubt that the defendant was involved in the scheme to defraud as charged, and that he used the mails or that the mails were used as charged, but you found that the defendant Allen's connection was only established beyond all reasonable doubt with any fraud involving the Ex-

tension, you could then only convict him of counts 1 and 4 of the first six counts, and you'd have to acquit him of counts 2, 3, 5 and 6.

On the other hand, if you were to find beyond all reasonable doubt that the defendant Allen participated in the scheme to defraud as charged, and that the mails were used as charged and that he did the things that I stated yesterday were necessary for conviction, but that he did not become connected with any such scheme until sometime during the life of the Pilot, and then only in connection with the Pilot, you would have to acquit him as to counts 1 and 4, because they relate to the Extension, and then you could only convict him as to counts 2, 3, 5 and 6; but as to count 7, the conspiracy count, while the evidence may show, if you so find beyond all reasonable doubt, that the defendant Allen conspired with Grismer and Keane or either of them for the purposes of using the mails to defraud as charged, and/or using the mails for the purpose of defrauding as charged by the sale of securities through the mails—would you read that as to count 7?

The Court:—and with respect to both the Pilot and Extension Companies, it is not necessary that the evidence establish beyond all reasonable doubt that he participated in any conspiracy as to both companies as charged. It will be enough if the evidence satisfies you beyond all reasonable doubt that he participated in a conspiracy for any period as to either of the two companies or both, and as to either the mail fraud

act or the Securities Act, either or both, but as I told you yesterday, in the event you find beyond all reasonable doubt that he participated in a conspiracy with some other person or persons consisting of both Keane and Grismer or either, that it would be necessary to show that after he knowingly and intentionally and wilfully participated in any such scheme, that a mailing overt act was performed in Spokane, Washington, at least one overt mailing act as charged in Spokane, Washington, after he had commenced to participate knowingly in the conspiracy, and that such overt mailing charge was related to the particular company concerning which you find beyond all reasonable doubt any conspiracy he participated in was connected with, although I told you that if you found beyond all reasonable doubt that he participated in the conspiracy charged as to both companies, that then the overt act or acts could be as to either or both companies.

I further told you yesterday and made plain to you that as to each of the counts, including the seventh count, while it was proper for the government to prove the entire scheme to defraud in the conspiracy alleged, that it was not required that the government prove all of it—what was that last?

* * * * * *

The Court:—the government prove all of it, but only that the government was required to prove beyond all reasonable doubt that the purpose of the conspiracy, and likewise the purpose of the scheme, was

for the doing of at least one of the several things of the larger number mentioned in the indictment which I yesterday told you of.

If a person individually devises a scheme to defraud by use of the mails and he sends one letter, he can be charged in one count, if that one letter is in connection with and for the purpose of furthering the fraud, whether it succeeds or not. If he sends ten letters for the same single scheme of himself alone, he can be charged in ten different counts, one count for each letter, although the government doesn't have to and probably wouldn't charge him with that many counts. If, however, an individual joins with some other person or persons in a scheme to use the mails to defraud, and one letter is sent, whether by him or by one of the others, or as a natural consequence of the performance of the intended scheme which that party should know in all probability would occur, then that individual and the other individuals can be charged in one count with conspiracy, and then they can also be charged in addition to the conspiracy with a separate count for each letter that was mailed, so that if two or more persons form a scheme to defraud, using the mails, and send one letter, there could be two counts against them, one of conspiracy and one that they mailed a particular letter for the purpose of effecting the scheme to defraud. If two or more persons joined in the scheme together to use the mails to defraud, and ten letters were mailed, then the two or more could be charged with a conspiracy in one count, and they also could be charged in ten separate counts, one for each

letter that was mailed. That would make a total of eleven, and there's not a duplication of charges, because each mailing is a separate count. The conspiracy is another separate count, and if in addition the scheme to defraud is to not only use the mails, but to use the mails to violate the Securities Act by selling shares of stock in a corporation, then there can be a charge of conspiracy, another charge of using the mails to defraud, and a third charge of using the mails to defraud through the sale of securities.

I've said this much because I have felt that your question indicated two things, one that you were wondering whether or not the defendant was not charged seven times with the same count, which he's not, and the second, whether or not the government had to prove each and all of the allegations of each count, or of count 1, because it's referred to in the others, and again, the government does not, but the government does have to prove for conviction of the defendant Allen as to each and every count all of the things beyond all reasonable doubt which I advised you yesterday it was necessary for the government to prove.

I'll let you know now that all of the instructions that I gave you yesterday are in full force and effect, including the presumption of innocence, reasonable doubt, its definition, and all of the other things that I told you yesterday. You may now retire (1269-1277).